COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1987

Manitoba
Labour Board

MG-14005

90-00450/

Labour

The Manitoba Labour Board

404 Power Building
428 Portage Avenue
Winnipeg, Manitoba, CANADA
R3C 0E2

(204) 945-3783

August 30th, 1989

Dear Sir/Madam:

RE: MANITOBA LABOUR BOARD
1987 COMPENDIUM
OF
GRIEVANCE ARBITRATIONS

The attached arbitration award summary was inadvertently substituted by another in the 1987 Compendium of Grievance Arbitration Decisions. Please include it with your copy.

We apologize for any inconvenience this error may have caused.

Yours truly,

J. Gilmore

Jodi Gilmore
Research Analyst

JG:li

Att.

FILE NO. AA87-02-002

EMPLOYER: Canada Safeway Ltd.

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: J.M. Christiansen, for the Employer
D. Primeau, for the Union

ISSUES:
1. Discipline: Penalties for Work Related Misconduct: Suspension 7:3542
2. The Doctrine of Culminating Incident: Use of Prior Record 7:4314
3. The Collective Agreement: Company Rules 4:1500

DECISION RENDERED: February 13, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was given a two-week suspension for horse play in the work place. This penalty represented the fifth step of the progressive discipline schedule. The Grievor previously had been disciplined for tardiness and absenteeism.

A fellow employee of the Grievor was moving some cases on a jigger. The cases fell over an inordinate number of times, as the twine securing them broke consistently. Examination of the breaks revealed that the twine was cut part-way through. The Grievor was reported to have asked the fellow employee if the latter was "having trouble" with the cases. Further, the Grievor allegedly knocked over cases that were still standing. An earlier incident in which the Grievor was involved led to suspicions that he was responsible for the prank. One and one-half months earlier, the Grievor allegedly locked the fellow employee in the back of the trailer.

The Grievor claimed that it was normal for employees to laugh and tease as cases fell over. He did not recall locking his fellow employee in the trailer, although he stated that such was a common practical joke at the facility.

Evidence was presented indicating that the Employer took a dim view of horse play and that employees engaging in same would be subjected to discipline.

AWARD: The grievance was denied. In light of the Grievor's record and the discipline agreed by the parties, the Arbitrator concluded that the discipline imposed was proper.

AUTHORITIES: None cited.

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Note: In the following headnotes, the term "Board" refers to a three member arbitration panel while the term "arbitrator" refers to a single arbitrator. The term "Board" should not be confused with the Labour Relations Board.

FILE NO. AA86-11-007

EMPLOYER: Dominion Stores Limited

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: Prof. F.M. Steel

APPEARANCES: R. Kersey, for the Employer
D. Primeau, for the Union
C. Malburg, for the Grievor

ISSUES:
1. The Arbitration Process: The Hearing: Preliminary Objections 3:2100
2. Jurisdiction of the Arbitrator: Limits to the Arbitration of Grievances: Arbitrability: Time Limits 2:3128

DECISION RENDERED: November 17, 1986

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer raised a preliminary objection that the Arbitrator lacked the jurisdiction to resolve the grievance on its merits. The objection was based on two grounds. First, the Union failed to comply with the time limits contained in the collective agreement and clause 113.5(4)(b) of **The Labour Relations Act.** Second, the Employer objected to the lengthy delay from the time that the hearing, originally scheduled for December 1985, was adjourned until the Union requested to convene the hearing in May 1986.

AWARD: The grievance was found to be arbitrable. In the case of the first objection, the Arbitrator ruled that because the collective agreement called for written responses and neither party had submitted a final written decision on the matter, time limits were not breached. On the second objection, the Arbitrator found that she was unable to determine the cause for the delay due to a lack of evidence. Possibly, after hearing the merits of the case, laches may be applied. In additon, the **Act** did not contain any stipulation on the time frame for a hearing to be completed.

AUTHORITIES: **Re: Radio Shack Division, Tandy Electronics and United Steelworkers (1980) 27 L.A.C. (2d) 246; Re Hotel, Restaurant and Cafeteria Employees' Union, Local 75 and Royal York Hotel (1983), 149 D.L.R. (2d) 268 (Ont. H.C.)**

FILE NO. AA86-12-009

EMPLOYER: The Brandon Clinic

UNION: Canadian Union of Public Employees,
Local 2096

BOARD: D.E. Bowman, Q.C., Chairperson
D.S. Fjeldsted, Nominee for the Employer
E. Black, Nomiee for the Union

APPEARANCES: G.T. Williams, for the Employer
B.P. Sheehan, for the Union

ISSUES:
1. Compensation: Computation of Vacation and Vacation Pay 8:3230
2. Interpretation of Collective Agreeements: The Object of Construction: Intention of the Parties 4:2100
3. Jurisdiction of the Arbitrator: Applications of Estoppel 2:2220
4. Temporary, Casual and Part-time Employees 5:1124

DECISION RENDERED: December 10, 1986

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Relationships between the parties had been governed since 1978 by a series of collective agreements which all contained the following two clauses. Article 1401 delineated the vacation benefits of the employees. Article 1702 stated that part-time and casual employees would accrue wages, conditions of employment and perquisites according to their hours of work.

From 1978 until February 1986, part-time employees were advanced increases in vacation time by months of service at the same rate as full-time employees. In February, a month after the newest collective agreement had been ratified, the Employer issued a policy statement which stated that the collective agreement had been misinterpreted since 1978 and vacations for part-time employees would be calculated on cumulative hours of service. Therefore, part-time employees would be required to work the number of hours equivalent to those worked by full-time employees before the next rate of vacation benefits applied. In the Employer's view, the policy would correct inequities enjoyed by part-time staff in reference to full-time staff.

The Union filed grievances for four individuals arguing that the collective agreement has been correctly applied and interpreted, over the years. As well, the Union stated that the Employer is estopped from enforcing or applying the new policy by its conduct over the years. The Employer countered that the Union was aware of the policy directive prior to execution of the new agreement. If the issue of estoppel arose, it should be terminated at the time the new agreement became effective because clear notice was given.

AWARD: The grievance was allowed. If the intention of the parties was to have part-time employees qualify for the next level of vacation pay when their hours of work equalled those of full-time staff, article 1401 should have clearly stated this. Therefore, in the view of the Board, article 1401 had been correctly interpreted and applied. On the issue of estoppel, the Board held that the Employer remained estopped until the negotiations began for the next agreement because it had not given the Union adequate notice of the policy change.

DISSENT: D.S. Fjeldsted, Nominee for the Employer. Mr. Fjeldsted felt that article 1401 was misinterpreted because article 1702 clearly intended to relate benefits of part-time employees to a pro-rata portion of a full-time employees' benefits depending on "hours of work". Concerning the issue of estoppel, Mr. Fjeldsted was of the opinion that it was not relevant to this case because the Employer "grandfathered" the benefits to past vacation entitlement. Thus, the grievors would now not be detrimentally affected by the new policy, especially when they were not entitled to receive the benefits. He also was of the view that the Union was generally made aware of the new policy prior to the signing of the agreement. Therefore, he would have dismissed the grievances.

AUTHORITIES: **Smoky River Coal Ltd., and United Steelworkers,** 18 D.L.R. (4th) 742; **Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303,** 8 L.A.C. (3d) 117 **(Birkett);** and others.

FILE NO. AA87-01-001

EMPLOYER: Canada Packers Inc.

UNION: United Food and Commercial Workers International Union, Local 111

BOARD: M.H. Freedman, Q.C., Chairperson
E.W. Olson, Q.C., Nominee for the Employer
S. Oakley, Nominee for the Union

APPEARANCES: D. Newman, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Discipline: Suspension 7:3542
2. Lateness 7:3140
3. The Reasonableness of the Penalty 7:4300
4. The Collective Agreement: Company Rules 4:1500

DECISION RENDERED: January 5, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor and others were working a shift, which gave them a one-half hour meal break after 8:00 p.m. The Grievor and four co-workers left the plant by car to have lunch at a restaurant. At the plant's gate house, an "okay" was given by the guard for the Grievor to sign out all of the others. At the restaurant, their orders were delayed so that time did not permit the five to have their entire meal there. They finished their meals in the car. On return to the plant, the Grievor signed himself in, and printed the others' names. He admitted being about ten minutes late for commencing work.

For security reasons, the Employer had posted notices regarding procedures to be followed at the gate house on entering and leaving the plant. The most recent notice stated, among other things, that, "your employee number, your name, and the time on the clock in the gate house must be legibly and correctly written by each person." The notice warned that failure to comply with the procedures constituted a breach of security, among other things, and of disciplinary action, including dismissal, that would follow for non-compliance. For lateness and for non-compliance, the Employer imposed a two-day suspension on the Grievor. The latter grieved unjust suspension.

AWARD: The grievance was denied. Ultimately, the issues before the Board were to decide whether the discipline imposed was reasonable or too harsh and if the Board should substitute its judgment for the Employer's. The Board was satisfied that the Grievor did not "legibly and correctly" write his employee number and name in the gate house book. The Grievor had printed only his first name and the time of leaving the plant. On returning, he had printed the first names of all the others. The Board considered that it was not the Grievor's intention to mislead or to defraud the Employer and that the former, up to the time of the incident, had a clear record. His lateness was not excessive, but the Grievor did contravene rules which he knew were in place. As a result, the Board upheld the two-day suspension imposed on the Grievor by the Employer.

AUTHORITIES: None cited.

FILE NO. AA87-01-002

EMPLOYER: Airport Motor Hotel

UNION: Hotel and Restaurant Employees and Bartenders Union, Local 206

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: W. Jurarsky, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Reasonable Explanation of Absence 7:3112
3. Compulsory Overtime 7:3634

DECISION RENDERED: January 14, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor alleged that she had been dismissed without cause. She had worked for the Employer as a waitress in the beverage room and occasionally in the lounge of the hotel. The beverage room closes one hour earlier than the lounge, and waitresses usually are assigned to work in the lounge for the extra hour. The Grievor was scheduled to work the extra hour in the lounge on a particular night. However, the schedule was changed such that it appeared that the Grievor was not required to work the extra hour and, thus, not in the lounge. It was her failure to work that hour that led to her dismissal.

The Employer alleged that the Grievor changed the schedule herself. The former recently had become the owner and, so, was unfamiliar with the scheduling process. The schedule had been prepared by a senior employee who was familiar with the process, and apparently it had been approved by the Employer. Subsequently, the former had made the change regarding the Grievor working the extra hour after some discussion with her.

AWARD: The grievance was allowed. The Arbitrator heard that the senior employee, in fact, did change the schedule after the Grievor objected to working in the lounge on the night in question. The Grievor believed that the senior employee had the authority to make changes. The Employer's argument that the senior employee had no authority to make changes to the schedule once it had been approved was not accepted, because according to the evidence she, the latter, neither specifically was given nor denied that authority. The Arbitrator concluded that the Grievor had been unjustly dismissed.

FILE NO. AA87-01-003

EMPLOYER: Molson Brewery Manitoba Ltd.

UNION: Brewery and Soft Drink Workers Local Union No. 330 of Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, C.L.C.

BOARD: J.M. Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
N. Thibault, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Compensation: Entitlement to Wages 8:1000
2. Illness: Benefits and Other Rights 8:3300
3. Jurisdiction of the Arbitrator: Policy Grievances 2:3124

DECISION RENDERED: January 13, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was laid off for the entire week from Monday, October 15, 1984, to Friday, October 19, 1984. On Wednesday of the week in question, he received a call from the Employer to work on Thursday, the following day. He was prepared to report to work as requested, but was unable to do so due to illness. He so informed the Employer. Under the Guaranteed Wage Plan the Grievor received payment for October 15, 16, 17, and 19, 1984, but did not receive any payment either for sick leave or guaranteed wage for Thursday, October 18, 1984.

The Union argued that the Grievor had not been laid off on Thursday and that if he had been able to work he would have received/earned eight hours' pay. It further argued that if the Grievor had not been called on the Wednesday to report for work on Thursday he still would have collected his Guaranteed Wage Plan payment under article 7 of the collective agreement. According to the grievance filed, a request was made either for sick pay for one day or for one day's pay under the Guaranteed Wage Plan program.

The Employer's position was that the Grievor was not entitled to any payment whatsoever and that the benefits requested were unearned.

AWARD: The grievance was allowed. The issue before the Board was to determine the benefits, if any, to which the Grievor was entitled. It concluded that the Grievor's request for sick pay was invalid. However, the Board accepted the argument that if the Grievor had not been recalled for work on Thursday he would be on "lay-off" and, thus, be entitled to his guaranteed wages. The Board ruled that the Grievor was entitled to receive the Guaranteed Wage Plan benefits for the day in question.

DISSENT: R. Simpson, Nominee for the Employer. Mr. Simpson would have dismissed the grievance, as in his view the Grievor was not entitled to receive payment under the Guaranteed Wage Plan for October 18, 1984. He contended that the failure of the Grievor to report for available work on October 18, 1984, reduced the amount of benefits to which the latter was entitled under the plan during that week.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-01-004

EMPLOYER: Lord Selkirk School Division No. 11

UNION: Lord Selkirk Teachers' Association No. 11 of the Manitoba Teachers Society

BOARD: J.M. Chapman, Q.C., Chairperson
D.H. Kells, Nominee for the Employer
L. Cherniack, Nominee for the Union

APPEARANCES: R. Simpson, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Organization and Direction of the Work Place: Revision of Classification and Rates 5:2440
2. Compensation: Educational or Experiential Increments 8:2330
3. The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: January 19, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The essence of this dispute was whether the years of apprenticeship the Grievor had served and the training he had received to become a Journeyman Electrician should be counted as related experience for the purpose of placing the Grievor at a specific step in his classification.

The Grievor was employed as a Vocational Industrial Teacher with the Employer. On being hired, he was placed on the salary schedule in class 4 and at step 2. Sometime later, he grieved that the Employer had violated and/or misapplied article 6A of the collective agreement by failing to properly evaluate his related experience and, so, had been improperly placed on the salary schedule. Further, he requested payment to him of all loss of salary which resulted from the improper classification; the Grievor was of the view that he should have been placed at step 4 in class 4. Article 6A of the agreement, in part, provided that experience be evaluated by the Employer and that, if approved, same would be recognized at the rate of one increment for each two years of the related experience. The Grievor claimed to have had nine and one-half years of related experience including four years as an apprentice. He claimed that his time as an apprentice was not in any way recognized as being relevant experience. The Employer argued that the classification sought by the Grievor would result in the latter receiving a double benefit, and that, further, under **The Public School Act** the Employer, as "management", was acting fully within its rights.

AWARD: The grievances were denied. It was the view of the Board that it would be improper and unreasonable for a journeyman tradesman to receive credit on the step scale for the years spent in acquiring his basic qualification. It accepted the argument that to grant full recognition of the apprenticeship period would be a duplication of benefits - an unrealistic situation. The Employer's interpretation of the criteria in article 6A of the collective agreement, according to the Board, was correct.

DISSENT: L. Cherniack, Nominee for the Union. Mr. Cherniack was of the view that apprenticeship years could be considered as "related experience" for which credit could be given. Mr. Cherniack believed that the Employer had failed to evaluate the Grievor's related experience properly by arbitrarily excluding for consideration any time spent in apprenticeship training without considering the value of the particular experience and by unfairly crediting another teacher with similar training experience as if his training experience was related experience. In Mr. Cherniack's view, the last two years of the Grievor's apprenticeship years were of relevant value and should have been credited to him.

AUTHORITIES: **Re United Electrical Workers, Local 523 and Union Carbide Canada Limited,** 18 L.A.C. 109; and Brown & Beatty, **Canadian Labour Arbitration,** (2nd ed.) p. 200, 201, 203, & 204.

FILE NO. AA87-01-005

EMPLOYER:	INCO Ltd.
UNION:	United Steelworkers of America, Local 6166
ARBITRATOR:	S.G. Sigurdson, Q.C.
APPEARANCES:	J.M. Christiansen, for the Employer R. Mayer, Q.C., for the Union
ISSUES:	1. Discipline: Discharge 7:3542 2. Insolent, Unco-operative Behaviour, Obscene Language 7:3660 3. Refusal to Follow Instructions 7:3610
DECISION RENDERED:	January 20, 1987
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor had worked as an underground miner throughout his working life, and a large percentage of that time with the Employer. Due to a substantial reduction in the underground work force, the Grievor was employed on the surface as a labourer - a placement he bitterly resented. Attempts on the part of the Grievor to get relocated underground failed, and ultimately led him to intense frustration.

A dispute arose after a foreman requested that the Grievor do some shovelling as part of a clean-up. The latter allegedly replied that, "you won't get much work from me." The foreman responded to the effect that he regarded the comment as a job refusal. The Grievor was alleged to have blown up; he used profanities and threatened the foreman. The former then directed the foreman to get the supervisor. The Grievor denied the incident as reported by the foreman. Following this episode, the Grievor's employment was terminated as he was deemed to be an "unsuitable employee."

AWARD: The grievance was denied. According to the Arbitrator, the Grievor, even based on his own version of the incident, demonstrated a totally unacceptable course of action. In considering whether or not dismissal was the appropriate response to the Grievor's insubordination, the Arbitrator concluded that the Employer had acted correctly. The Grievor's outbursts led the Arbitrator to conclude that reinstatement, at least on the surface, was not a feasible alternative. To order reinstatement underground, according to the Arbitrator, would be tantamount to saying to others in the work force that they can achieve their objectives through pressure tactics and intimidation.

AUTHORITIES: Palmer, **Collective Agreement Arbitration in Canada** (2nd ed.).

FILE NO. AA87-01-006

EMPLOYER: Canada Packers Inc.

UNION: United Food & Commercial Workers International Union, Local 111

BOARD: M.H. Freedman, Q.C., Chairperson
H. Piercy, Nominee for the Employer
T. Ulrich, Nominee for the Union

APPEARANCES: D. Newman, for the Employer
M. Myers, Q.C., for the Union

ISSUE:
1. Jurisdiction of the Arbitrator: Time Limits 2:3128
2. Delay 2:3210
3. Applications of Estoppel 2:2220
4. Subsections 108 and 109 of **The Labour Relations Act**

DECISION RENDERED: January 21, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was dismissed on October 22, 1985, and grieved unjust dismissal by the Employer. When the matter went to arbitration, the Employer raised an objection about the arbitrability of the matter, having regard to certain procedures set forth in the agreement, which, it alleged, had not been followed by the Union. The award then was with regards to the Employer's objection.

The Employer alleged that the Union had breached time limit procedures according to article 8 of the agreement. Article 8 stated that if a matter is to be referred to arbitration the Union will notify the Employer of its nominee to the arbitration board within 15 working days after the fourth step meeting. The Employer received word from the Union on January 8, 1986, the latter advising of the matter going to arbitration and of the Union's nominee. The fourth step meeting was held on November 13, 1985. The Employer alleged that the Union did not appoint a nominee until January 8, 1986, and prior to that time, the only indication given the former of any interest to go to arbitratation was the alleged conversation on November 13, 1985. Relief from breach of time limits was not a matter of course, but compelling reasons for breach must be presented before relief is granted.

The Union agreed that the time limit had expired. However, it presented the following as its reasons for non-compliance: difficulty in locating counsel; the President of the Local preparing for a trip; and the holiday rush. Further, the Union contended that according to past practice there were no problems with late submissions.

AWARD: The grievance was declared to be arbitrable. The Board noted that the power to relieve against breaches of time limits was expressed as a power to relieve when it was just and equitable to do so, but that the concept of "justice" and "equity" were only statutorily applicable. The Board maintained that it was not enough for the Union to say that it missed the time limit and it was irrelevant why it missed it and relief should be granted because the Board has the power to do so; after all, the time limit provision was negotiated between the parties. However, the Board noted that the statutes stated, in effect, that notwithstanding what the parties had agreed to if it (the Board) chose to exercise its discretion it may do so, and if relief is granted it would be done on just and reasonable terms. The Board accepted the Union's assertion that it (the Union) had difficulties in arranging a meeting with its counsel, and regarded this as the most compelling reason for non-compliance. According to the Board, the case was a borderline situation. A majority of the Board was satisfied that the breach was not a serious one and that the Employer did not suffer any serious prejudice as a result of non-compliance.

DISSENT: H. Piercy, Nominee for the Employer. In Mr. Piercy's opinion, the Union's explanation for the delay had been nothing more than as stated - an explanation. It was Mr. Piercy's contention that there had been no justifiable reason advanced by the Union for the delay in complying with the time limits contained in the collective agreement.

AUTHORITIES: **Re Corporation of the City of Brantford and Canadian Union of Public Employees, Local 181**, 9 L.A.C. (3d) 289 at 293.

FILE NO. AA87-01-007

EMPLOYER: Canada Packers Inc.

UNION: United Food & Commercial Workers International Union, Local 111

BOARD: M.H. Freedman, Q.C., Chairperson
E.W. Olson, Q.C., Nominee for the Employer
H. Matthews, Nominee for the Union

APPEARANCES: D. Newman, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Employee Disability 7:3200
3. Seniority: Acquisition and Termination: Non-Working Periods 6:1110
4. The Arbitration Process: Admissibility of Evidence: Past Practice 3:4430
5. Jurisdiction of the Arbitrator: Applications of Estoppel 2:2220

DECISION RENDERED: January 23, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, because of ill health, was absent from work. He was unable to return to work within the allowable period set out in the collective agreement for persons absent due to illness or injury. The Grievor had more than six months, but less than one year, of seniority with the Employer. The Employer informed the Grievor by letter of his termination of employment and cessation of employee benefits. The Grievor subsequently was rehired some months later.

The Employee grieved that he was unjustly dismissed; he sought reinstatement with all benefits and also the removal of the letter from his file, and an apology. The Employer argued that the termination was not disciplinary, but was purely contractual under the agreement. The Grievor's medical report stated that he was then not fully capable of returning to work by the time his (the Grievor's) allowable break had expired. In addition, the Employer argued that the Union had estopped by its word and conduct with regard to previous similar cases.

The Union argued that the agreement did not give the Employer the right to terminate the Grievor because of sickness or illness. The Union disagreed with the Employer's interpretation regarding when the allowable break expired. Regarding estoppel, the Union claimed that it was unaware that on previous occasions there were discharges made in similar situations.

AWARD: The grievance was allowed in part. The Board found that on the basis of the facts, the discharge of the Grievor should not have taken place when it did, and that his seniority should not have been broken when it was.

DISSENT: E.W. Olson, Q.C., Nominee for the Employer. Mr. Olson concurred with the ultimate conclusion of the grievance, but expressed a contrary view on the interpretation to be placed on the collective agreement. He maintained that, according to the agreement, if the Grievor was not able to return within the allowable break period, he was then generally absent from work in an unauthorized mode, again in accordance with the agreement, and therefore, subject to separation. Mr. Olson was of the view that the Union indeed had estopped by its words and conduct.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-01-008

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: M. Samphir, Q.C., for the Employer
M. Myers, Q.C., for the Union

ISSUES: 1. Discipline: Suspensions 7:3542
2. Refusal to Follow Instruction: 7:3610
3. Health and Safety 7:3621

DECISION RENDERED: January 26, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was suspended for three days after failing to comply with safety requirements at the workplace. On four separate occasions before the suspension, he was issued a notification of safety violations for not wearing safety footwear as a Backhoe Operator on construction sites. The Grievor contended that the boots were too uncomfortable or were too hazardous, as he did not have the sensitivity when touching the controls with his feet due to steel plate in the boots. He had agreed to keep the safety shoes with him and change into them each time he left the cab.

The Employer argued that it was complying with the appropriate provisions of **The Workplace Safety and Health Act** and **Regulation** passed thereunder. The requirement of wearing specified safety boots was mandatory, the Employer argued - no one had the discretion to vary the **Regulation**. Also, the Employer felt that it would be unrealistic for the Grievor to change footwear any time he left the cab.

The Union contended that it was extremely concerned with safety for its members, but that the concern for safety should be real. The Employer had acted in an irresponsible and unreasonable manner, considering the clear evidence that there was no danger to the Grievor while he was working within the cab.

AWARD: The grievance was denied. The Arbitrator was not satisfied that the Grievor would have suffered any injury to himself by wearing the designated footwear. The Grievor may have been uncomfortable but discomfort did not constitute a danger in that situation. The Arbitrator was satisfied that the rule regarding the wearing of safety boots was reasonable, clear, unequivocal, and consistent with the collective agreement and with the legislation.

AUTHORITIES: **The Labour Relations Act**, s. 69.2(2); **The Workplace Safety and Health Act, M.R. 189/85**; and **Re Lumber and Sawmill Workers Union, Local 2537 and KVP Co. Ltd.**, 16 L.A.C. 73.

FILE NO. AA87-01-009

EMPLOYER:	Agassiz School Division No. 13
UNION:	Agassiz Division Association No. 13 of the Manitoba Teachers' Society
BOARD:	M.H. Freedman, Q.C., Chairperson D. Kells, for the Employer D. Shrom, for the Union
APPEARANCES:	R.A. Simpson, for the Employer M. Myers, Q.C., for the Union
ISSUES:	1. Compensation: Fringe Benefits: Qualifying for Medical and Disability Benefits 8:3320 2. Illness: Benefits and Other Rights 8:3300
DECISION RENDERED:	January 26, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, an Assistant Principal, wrote to the Division on May 13, 1985, informing her Employer of her taking leave from May 27 to June 14, 1985. She was expecting her first child around May 27, 1985. The Grievor had accumulated about 60 days of sick leave, and decided to take some of the accumulated time, as she believed her absence from work would be covered by the sick leave provisions of the collective agreement. She was aware that she could have applied for maternity leave, but did not wish to avail herself of that right.

When the Grievor returned to school in June 1985, she realized that she had not received her two weeks' pay for her absence in June. The Employer had considered her absence as a maternity leave, and had resolved to grant same from May 21, 1985, to June 14, 1985, under **The Employment Standards Act**.

The Employer argued that the Grievor was not sick, and that her absence from work was exclusively a consequence of her pregnancy, which was not an illness. The Employer contended that article 8:07 of the agreement, headed "Maternity Leave", clearly removed the condition of pregnancy from the sick leave clause.

The Union argued that the Grievor was entitled to sick leave as an earned benefit, and that essentially maternity leave is a right which a female teacher has, if she chooses to exercise it.

Further, the Grievor was clearly sick and, so, was entitled to sick leave.

AWARD: The grievance was allowed. The Board was satisfied that pregnancy is not an illness, but a normal biological function. However, pregnancy does reach a stage where the female employee is unable to perform her normal duties of employment. Such a condition is properly characterized as a condition of sickness. A majority found that the Grievor was unable to work because of sickness, and concluded that the sick leave plan ought to be interpreted such that the Grievor receive the benefit. Also, a majority ruled that the maternity leave provisions were inapplicable because the Grievor did not opt to avail herself of those provisions.

DISSENT: D. Kells, Nominee for the Employer. Mr. Kells concurred for the most part with the facts. He departed from the award with regard to the interpretation of the agreement. His view was that the majority had erred in concluding that the word "sick" or "sickness" included an inability to work as a result of "a normal delivery and confinement." Mr. Kells believed that the majority had confused the term "sickness" with "disability."

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-01-010

EMPLOYER: The City of Winnipeg

UNION: Amalgamated Transit Union, Local 1505

BOARD: D.E. Bowman, Q.C., Chairperson
G.D. Parkinson, for the Employer
W. Lampe, for the Union

APPEARANCES: M. Samphir, Q.C., for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Assault 7:3430
3. The Doctrine of the Culminating Incident 7:4310
4. The Final Incident 7:4312

DECISION RENDERED: January 29, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as a bus driver with the Employer. He alleged that he was cut off by a car at a bus stop. He followed a female who had been a passenger in the offending vehicle into her place of employment nearby. His intention was to learn the name and other particulars of the driver. The woman claimed that she was pushed, berated, and subjected to profanity by the bus driver. The latter was discharged after the incident.

The Grievor previously had been charged with assault, to which he had pleaded guilty. He was disciplined and later reinstated as a bus driver with clear warning that any repetition of his behaviour would result in the termination of his employment.

The Board heard that the Grievor was an overachiever, and worked long and sometimes unreasonable hours. He was, thus, under stress. The Grievor had been receiving professional help, and had made significant progress in learning to cope with his stress.

The Employer contended that the Grievor had received ample warning, and urged that, in the situation, the doctrine of "culminating incident" was applicable.

The Union argued that discharge was too severe a penalty, and that the Grievor should be given further employment opportunities, not necessarily as a bus driver.

AWARD: The grievance was denied. The Board concluded that the Employer was justified in discharging the Grievor. In the Board's view, the Grievor was the author of his own misfortune to the extent that his excessive hours of work contributed to his behaviour and reaction to a problem.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-01-011

EMPLOYER: New Flyer Industries Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: G.D. Parkinson/J. Youngman, for the Employer
S. Spratt, for the Union

ISSUES:
1. Seniority: Application of Seniority: Bumping Upward 6:2340
2. The Skill and Ability Requirement: Proof of Ability 6:3200
3. Examination and Tests 6:3340

DECISION RENDERED: January 30, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as a Storesman in one of the Employer's plants. He had eleven years of seniority, and in an impending layoff, chose to "bump" an employee with less seniority at another plant. The Grievor was given a test on which, according to the Employer, he did poorly. The Grievor felt that the test was not fairly set or administered. Further, he never received the result of the test.

The Employer maintained that the test was approved by the designated Committee under the collective agreement and, further, that neither the Grievor nor anyone acting on his behalf at any time objected to the test.

According to the Union, the test was primarily unfair because the Grievor did not know what was expected of him, as he was not given a tour of the plant or an explanation of the materials he was supposed to handle. The Grievor should have been advised of the standard he was to be measured against and consideration given to differences between the various plants.

AWARD: The grievance was allowed. In determining the reasonableness of the test, the Arbitrator considered five criteria set out in Palmer's **Collective Agreement Arbitration in Canada**, as follows: the reason for the administration of the test; the adequacy of preparation for the test afforded the grievor; the administration of the test . . . ; the reliability of marking; and the relevancy of the test to the work to be done. Mr. Chapman concluded that the Employer did err regarding the "adequacy of preparation" criteria. As a result, he directed that the Grievor be given a tour of the plant and that a new test be administered shortly after the tour. The Arbitrator maintained jurisdiction to deal with issues that may have arisen after the test was completed.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, (2nd ed.) p. 306 pp. 326-329; and Palmer, **Collective Agreement Arbitration in Canada**, (2nd ed.) pp. 532-545, p. 537.

FILE NO. AA87-01-012

EMPLOYER: New Flyer Industries Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: G.D. Parkinson/J. Youngman, for the Employer
S. Spratt, for the Union

ISSUES:
1. Seniority: Application of Seniority: Lay-off 6:2200
2. Bumping 6:2330
3. The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: January 30, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer laid off the Grievor as a result of a reduction of work at the plant. The latter worked as a Material Handler/Fork Lift Operator, and had 15 1/2 years of seniority. The Grievor attempted to bump to the position of Assistant Machine Operator, but this was denied by the Employer as there was no vacancy in this classification. Fork lift vehicles were still being operated after the Grievor's lay-off.

The Union alleged that the lay-off was unjust because, they alleged, the work performed by the Grievor was still being done by other employees, some with less seniority than the Grievor. The Union further alleged that the Employer had unilaterally abolished a job classification while the Grievor's work was rolled up into other classifications.

The Employer's position was that the Union erred in the conception of the work being done by the members of the work force. While fork lifts were still being used to move material, such movement of material had always been a necessary and incidental duty to the job. Further, if there was any additional material handling work to be done, the amount was so insignificant that it was not possible to justify a full-time Fork Lift Operator.

AWARD: The grievance was denied. The Arbitrator was satisfied that there was a considerable slowdown at the plant and that the other employees, as an incidental part of their work, had always been involved in some material handling and in some operation of the fork lift vehicles. The Arbitrator was, likewise, satisfied that the position of Material Handler/Fork Lift Operator had not been abolished. The Employer had not acted unjustly.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-02-001

EMPLOYER: City of Portage La Prairie

UNION: Canadian Union of Public Employees, Local 1002

ARBITRATOR: L. Cherniack

APPEARANCES: W.R. Woodman, et al, for the Employer
G. Williams, et al, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Policy Grievances 2:3124
2. Organization & Director of the Work Place: Revision of Classification & Rates: 5:2440

DECISION RENDERED: February 7, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: An individual was hired by the Employer to be an apprentice heavy-duty auto mechanic. This hiring created a new classification, and the parties could not agree on the appropriate rate of pay for the new classification.

The Employer's position was that the apprentice be paid on the basis of the Provincial Mininum Wage Schedule plus 15 percent in the first year, 35 percent in the second, 55 percent in the third, and 75 percent in the fourth. The Union argued for comparability with The City of Winnipeg unionized rates, which were significantly higher than the rate quoted by the Employer.

AWARD: The Arbitrator made some comparison of wage rates between The City of Winnipeg and the Employer in other positions to get some idea of comparability. He noted, however, that it was difficult to make comparisons because The City of Winnipeg had more specific classifications than did the Employer. After taking all factors into consideration, the Arbitrator decided on an appropriate rate for 1987 ranging from $7.82 per hour in the first year to $9.66 per hour for the fourth year.

AUTHORITIES: None cited.

FILE NO. AA87-01-002

EMPLOYER: Airport Motor Hotel

UNION: Hotel and Restaurant Employees and Bartenders Union, Local 206

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: W. Jurarsky, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Reasonable Explanation of Absence 7:3112
3. Compulsory Overtime 7:3634

DECISION RENDERED: January 14, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor alleged that she had been dismissed without cause. She had worked for the Employer as a waitress in the beverage room and occasionally in the lounge of the hotel. The beverage room closes one hour earlier than the lounge, and waitresses usually are assigned to work in the lounge for the extra hour. The Grievor was scheduled to work the extra hour in the lounge on a particular night. However, the schedule was changed such that it appeared that the Grievor was not required to work the extra hour and, thus, not in the lounge. It was her failure to work that hour that led to her dismissal.

The Employer alleged that the Grievor changed the schedule herself. The former recently had become the owner and, so, was unfamiliar with the scheduling process. The schedule had been prepared by a senior employee who was familiar with the process, and apparently it had been approved by the Employer. Subsequently, the former had made the change regarding the Grievor working the extra hour after some discussion with her.

AWARD: The grievance was allowed. The Arbitrator heard that the senior employee, in fact, did change the schedule after the Grievor objected to working in the lounge on the night in question. The Grievor believed that the senior employee had the authority to make changes. The Employer's argument that the senior employee had no authority to make changes to the schedule once it had been approved was not accepted, because according to the evidence she, the latter, neither specifically was given nor denied that authority. The Arbitrator concluded that the Grievor had been unjustly dismissed.

AWARD: The grievance was denied. In light of the Grievor's record and the discipline agreed by the parties, the Arbitrator concluded that the discipline imposed was proper.

AUTHORITIES: None cited.

FILE NO. AA87-02-003

EMPLOYER:	The Province of Manitoba
UNION:	Manitoba Association of Crown Attorneys
ARBITRATOR:	G.C. MacLean, Q.C.
APPEARANCES:	E.W. Olson, Q.C., for the Employer A.R. McGregor, Q.C., for the Union
ISSUES:	1. Compensation: Entitlement to Wages: Wage Guarantees 8:1200 2. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
DECISION RENDERED:	February 26, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who had been on maternity leave in 1985, filed her 1985 tax return, and discovered that she was required to repay Unemployment Insurance (U.I.) benefits.

The issue before the Arbitrator was the interpretation of the collective agreement and the Province of Manitoba Supplementary Unemployment Benefit (S.U.B.) Plan. Article 16 of the agreement entitled, Maternity Leave, Paternity Leave and Adoptive Parents, at clause 10(b), stated that:

> . . . for up to a maximum of fifteen (15) additional weeks, payments equivalent to the difference between the U.I. benefits the employee is eligible to receive and 93% of her weekly rate of pay;

The Province of Manitoba (S.U.B.) Plan in one of its provisions stated that:

> Benefits payable under the plan are a sum, which combined with gross U.I. benefits and all other earnings, equals 93% of the employee's weekly earnings.

The Employer's position was that it had paid the Grievor during her maternity leave a supplement such that Unemployment Insurance (U.I.) benefits in combination with the supplement equaled 93 percent of her weekly wage. Once it had done that, the Employer contended that it had fulfilled its obligation, and was not required to concern itself with subsequent changes to the U.I. benefits.

The Union argued that as a result of the repayment the Grievor, in effect, received the amount of the repayment less than the 93 percent of her salary to which she was entitled.

AWARD: The grievance was allowed. It was the view of the Arbitrator that the parties intended that an employee in the Grievor's position, having met all requirements, was entitled to receive 93 percent of her salary through the maternity leave period. The Grievor did at that time receive the full 93 percent, and continued to have the benefit of that money until her repayment. Upon repayment the Grievor no longer had the full 93 percent. It was the Arbitrator's opinion that the latter situation ran counter to the intention of the parties and, so, the Employer should pay the difference.

AUTHORITIES: None cited.

FILE NO. AA87-02-004

EMPLOYER: Canada Packers Inc.

UNION: United Food and Commercial Workers International Union, Local 111

BOARD: W.D. Hamilton, Chairperson
E.W. Olson, Q.C., Nominee for the Employer
W. Armstrong, Nominee for the Union

APPEARANCES: D. Newman, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Limits to the Arbitration of Grievances: Arbitrability: Time Limits 2:3128
2. The Arbitration Process: Preliminary Objections 3:2100
3. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100

DECISION RENDERED: February 26, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was suspended for five days without pay. The Union filed a grievance alleging that the Grievor was unjustly suspended. At the outset of the hearing, the Employer raised an objection as to the arbitrability of the matter. The Employer stated that the Union failed to refer the grievance to arbitration in accordance with article 8 of the collective agreement. As stated in the article, the Union must notify the Employer if a particular matter would be referred to arbitration and of its Nominee to the arbitration board within 15 working days following the completion of the fourth step of the grievance procedure. Although the Union notified the Employer within the stipulated time frame that the matter would proceed to arbitration, the Nominee was not named until five months later. Therefore, due to the Union's failure to adhere to time limits, the Employer felt that the Board should uphold the objection and dismiss the grievance.

The Employer based its argument on three points. First, the Board had to dismiss the grievance because the time limits were breached by the Union. Subsection 109(2)(e) of **The Labour Relations Act**, which allows for relief against breaches of time limits set out in the collective agreement, was inapplicable because the Board must be properly constituted before exercising jurisdiction under this section. Second, if the Board did decide it was properly constituted, it must still dismiss the grievance because the equities favour the Employer's position. The Union was aware of the Employer's position on time limits and chose to proceed to arbitration at its leisure. Third, if the Board disagreed on the first two points and granted any relief on time limits, the Employer argued that the Union should pay all the Employer's costs of the hearing because the Union was solely at fault in this case.

The Union was of the position that its notification was: (a) proper referral of the matter to arbitration; (b) filed within the time limits; and (c) consistent with prior referrals. The Union stressed that it had no intent to abuse the process. Any laxness in naming its Nominee was not intentional, but the naming had merely gotten "lost in the shuffle." The Union concluded that the Grievor should not be penalized for the Union's actions.

AWARD: The grievance was found to be arbitrable. The Board did not accept that it must be perfectly constituted to invoke subsection 109(2)(e) of the **Act**. That section, when taken with section 106, accounts for situations where a Board has been improperly constituted due to procedural defects such as breach of time limits, and allows it to rectify those defects to allow matters to proceed. As stated by the Board, the Union could not rely on the doctrine of estoppel because past practices were not comparable to the Union's actions in this case. However, the

Union had not intentionally disregarded or abused the time limits in the collective agreement. The Board also noted that the Grievor was not responsible for any delay. This is a factor other boards have taken into account. Thus, the Board ruled that although the notification presented by the Union was imperfect compliance with article 8, it had evidenced an intent to refer to arbitration and had been given within the stipulated time limits. The Board could not grant the Employer's request that the Union pay for all costs because, as stated in section 107 of the Act, unless provided otherwise in the collective agreement, which it was not in this case, each party would be responsible for its own costs. In conclusion, the Board found the situation to be borderline and reluctantly relieved against the breach of the time limits.

DISSENT: E.W. Olson, Q.C., Nominee for the Employer. Mr. Olson disagreed that the notification was an imperfect compliance. According to the collective agreement, the notification should have named the Nominee of the Union. Because it had not, the Union did not comply with the grievance procedures. The discretion to relieve from breaches of time limits ought to be sparingly exercised, and only when there are good reasons, such as factors outside the control of the Union. No such "independent factor" occurred in this case. Therefore, Mr. Olson would not have found the grievance to be arbitrable.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-03-001

EMPLOYER: Province of Manitoba

UNION: The Manitoba Government Employees' Association

ARBITRATOR: P.S. Teskey

APPEARANCES: R. Cann, for the Employer
T. Turcan, for the Union

ISSUES:
1. Discipline: Criminal Conduct: Criminal Charges 7:3424
2. The Doctrine of the Culminating Incident: Use of Prior Record 7:4314
3. Insolent Unco-operative Behavior: Obscene Language 7:3660
4. The Arbitration Process: Preliminary Objections 3:2100

DECISION RENDERED: March 12, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor had been employed as a Highway Traffic Inspector 1, and grieved that he was unjustly dismissed from his employment. The reasons given for the termination were a criminal conviction of impersonating a Peace Officer and consideration of the Grievor's previous disciplinary record.

At the commencement of the hearing, the Arbitrator heard of a five-day suspension imposed on the Grievor, which was then still unsettled and was set for arbitration. The parties conferred jurisdiction upon the Arbitrator to deal with both the suspension and the termination grievances.

The five-day suspension was as a result of the Grievor's alleged verbal abuse of a supervisor. The latter further alleged that the Grievor made comments which he took as a threat of force.

Highway Traffic Inspectors are appointed as Peace Officers to enforce certain sections of **The Highway Traffic Act**, such as to issue offence notices and to conduct appropriate investigation when required. The Employer alleged that the Grievor had used his Peace Officer status and badge off the job. Such a charge was regarded as a serious breach of trust.

The Grievor charged that he was being targeted for dismissal, and was being "baited" by certain events to put him in a highly emotional state. He contended that certain comments made by him were taken out of context. He did not comment on the impersonation charge, as the matter was still before the courts. However, the Grievor said that the incident involved a misunderstanding.

AWARD: The grievance was denied. The Arbitrator, in dealing with the suspension issue, found that the Grievor was provoked to some extent by the supervisor. However, the Grievor went beyond what was acceptable. The suspension was upheld, but was reduced from five days to three days.

Regarding the termination, the Arbitrator found that the employment relationship between the Grievor and his supervisor was badly eroded. Further, he was satisfied that the Grievor's conduct was serious and improper and impacted upon the credibility of both the Department and the Grievor. Reinstating the Grievor, according to the Arbitrator, would lead to further difficulties. The grievance as to termination was dismissed.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-03-002

EMPLOYER: Canada Safeway Ltd.

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: J.M. Christiansen, for the Employer
D.R. James, for the Union

ISSUES:
1. Discipline: Penalties for Work Related Misconduct: Suspension 7:3542
2. The Doctrine of Culminating Incident: Use of Prior Record 7:4314
3. The Collective Agreement: Company Rules 4:1500

DECISION RENDERED: March 19, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: This issue was regarded as the "lobster incident." The Grievor, the Manager of the Sea Food Department, was seen carrying three dead lobsters out of the store. When questioned about them, he informed his supervisor that he was returning them to the suppliers, as was customary when goods received were damaged or spoilt. The Employer learned from the suppliers that the lobsters had not been returned, as stated by the Grievor. The Employer charged that the Grievor had taken the lobsters home for his own consumption, and the latter was terminated from his employment.

Witnesses related "suspicious circumstances", which led them to believe that the Grievor had, in the past, been dishonest.

AWARD: The grievance was allowed in part. It was the Arbitrator's view that the Employer, upon learning of those suspicious circumstances, regarded the lobster incident as a culminating incident. The Arbitrator disagreed. He believed that the impressions so formed by the witnesses were on the basis of hindsight, and that they did not fully understand the latitude given to the Manager of the Sea Food Department. In his view, the Grievor's reputation was unblemished before the lobster incident. Based on the evidence presented, the Arbitrator concluded that the

Grievor did not take the lobsters home for his own consumption. Therefore, the Arbitrator substituted the decision of management to discharge with a lesser penalty. He ordered that the Grievor be reinstated without loss of seniority, but without compensation for wages lost, to a position other than Sea Food Manager at an equivalent wage. After three months, the Grievor would be returned to his position as Sea Food Manager.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, (2nd ed.), p. 387.

FILE NO. AA87-03-003

EMPLOYER: The University of Manitoba

UNION: The University of Manitoba Faculty Association

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: W.D. Hamilton, for the Employer
R. Tonn, for the Union
Y.M. Henteleff, Q.C., for Dr. Jefferson

ISSUES:
1. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
2. Management's Duty to Act Fairly 4:2320
3. The Arbitration Process: Preliminary Objections 3:2100
4. The Jurisdiction of the Arbitrator: Limits to the Arbitration of Grievances: Arbitrability: Compliance with the Grievance Procedure 2:3120

DECISION RENDERED: March 30, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The essence of the grievance brought forth was that the Grievor's qualifications were superior to those of at least the candidate recommended by the Department Head and the Dean, and that the procedures prescribed for the conduct of the Selection Committee had not been followed.

At the commencement of the hearing, the Employer raised a preliminary submission pursuant to subsection 108(1)(f) of **The Labour Relations Act** as to the Arbitrator's jurisdiction, "to determine any question as to whether the matter is arbitrable . . ." The Employer's position was that because the Grievor was the only person who had grieved the appointment and because he had not been named as an alternative or second in line for the appointment then the matter could not be arbitrated, as the Grievor could not receive the appointment. The Arbitrator ruled that the matter before him was arbitrable, and determined, given the withdrawal of specific allegations by the Grievor, that the issue to be decided was whether the hiring provisions of the collective agreement were violated.

Evidence was presented which indicated that the Department Head not only had disagreed with but also had misrepresented the Committee's recommendation to the Dean. The Department Head played a dual role. As Head, she was entitled and expected to advise the Dean with respect to his final decision. As Chairperson and Co-ordinator of the Search Committee, her function was to pass on to the Dean of Education the recommendations of the Search Committee.

The Union contended that the whole Committee was advisory to the Dean and that the Department Head was not entitled to interfere with or misrepresent the work and advice of the Committee. The Employer countered with the argument that article 18, although laying great stress on the Faculty in the selection process, did not grant to it exclusive or prohibitory control. Further, the Employer suggested that the Department Head's recommendation was contemplated by the structure of the procedure.

AWARD: The grievance was allowed. The Arbitrator noted that under article 18 the Dean had empanelled a Search Committee following the procedure set out. The Committee carried out a vital function, and was entitled to have its conclusions considered with great care, free from taint or bias. The Arbitrator found the actions of the Department Head were foreign to the selection process, and concluded that he had jurisdiction to order that the process be nullified and the entire question be remitted back to the Faculty. However, noting the many disruptions that would occur, he made no order for any specific steps to be taken. As a result, the Arbitrator contended himself with the finding that the terms and intent of the collective agreement had been violated.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-001

EMPLOYER: The Board of Police Commissioners of The City of Brandon

UNION: Brandon City Police Association

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: A.M. Hunt-Binkley, for the Employer
J.P. Janzen, for the Union

ISSUES:
1. Organization & Direction of the Work Place: Assignment of Work Outside the Bargaining Unit 5:1000
2. Seniority: Non-Unit Employment 6:1120
3. Jurisdiction of the Arbitrator: Collective Agreement Limitations 2:3100

DECISION RENDERED: April 3, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer had posted an advertisement for an Administrative Officer for the Police Force. The position was filled by a non-union member. The Union submitted that the position should have been filled by a Union member. Interviews for the position were conducted by a Selection Committee whose composition had changed from that which conducted a prior interview for a similar position for which six union members were considered. The Union further grieved that by changing the composition of the Committee such procedures were improper, unreasonable, unfair, and probably biased.

Before the proceeding began, the Employer raised the question as to the arbitrability of the grievance. The Employer submitted that the Arbitrator did not have the right to review the former's decision unless there was specific jurisdiction to do so with respect to the issues in question. In support of the above position, the Employer argued that the positon of Administrative Officer, which carried the rank of Inspector, was one which was outside the scope of the bargaining unit represented by the Union, and so there was no requirement that the position be awarded to a member of the Union.

The Union agreed that the position of Inspector was out of scope of the bargaining unit, but submitted that the procedures respecting promotion created a "proprietary interest" for members of the Union to the Senior Officer's position.

AWARD: The Arbitrator found that the grievances were not arbitrable. In his view, if members of the Union, as defined in the collective agreement, were to have a proprietary interest in out-of-scope positions, then there should have been a specific link in the agreement which gave such rights to members. The Arbitrator noted that such a nexus had not been present, and, accordingly, held that he was without jurisdiction to hear the merits of the grievances.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-002

EMPLOYER: Headingley Correctional Institute

UNION: The Manitoba Government Employees' Association

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: G. Mitchell/J. Palamar, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Assault 7:3430
3. Criminal Charges 7:3424
4. The Reasonableness of the Penalty 7:4300

DECISION RENDERED: April 3, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: An interim award previously had been issued, and led to the hearing of the merits of this particular grievance.

The Grievor worked as a Correctional Officer, and was convicted of "causing bodily harm" after allegedly striking an inmate. He was sentenced to a six-month conditional discharge. The victim had uttered obscenities, as a registration of his feeling of dissatisfaction for work assigned for lateness. He was struck by the Grievor, in what was regarded to have been an unprovoked response.

The Employer submitted that it was justified in terminating the Grievor's employment, and told of the awkwardness associated with the continuing employment of a Correctional Officer who had assaulted an inmate. Further, staff should act as role models, and according to the Employer, the Grievor, by his action, did not fit that role. The Union argued for a less severe penalty than that imposed by the Employer.

AWARD: The grievance was denied. Based on the evidence, the Arbitrator concluded that the Grievor did commit the assault. In so doing, the latter had abused his power and had breached a public trust. Given the nature and circumstances of the assault and the absence of factors sufficient to mitigate the penalty, the Arbitrator found that the Employer had just cause for dismissing the Grievor.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-003

EMPLOYER: The Province of Manitoba

UNION: The Manitoba Government Employees' Association

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: O. Zabloski, et al, for the Employer
R. Erb, et al, for the Union

ISSUES:
1. Compensation: Entitlement to Wages 8:100
2. Overtime Work 8:2130
3. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100

DECISION RENDERED: April 6, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The issues to be decided in the matter were whether various phone calls received and made by the Grievor, a Health and Social Development Specialist III, constituted work performed for the purpose of compensation under the collective agreement, and, if so, the number of services or hours of service that must be provided within particular time periods to justify overtime pay.

Article 3:06 of the agreement stated that an employee, if called out or scheduled to work overtime shall receive for the work, compensation for a minimum of three hours . . . provided that the period of overtime worked by the employee is not contiguous to his scheduled working hours . . .

The Grievor grieved that he had been unjustly denied credits for "call out" services on three specified occasions. The Grievor provided services such as child welfare, mental health, and rehabilitation. Such services were provided in a variety of ways, such as by personal contact, by correspondence, and over the telephone. The Grievor was used to claiming and receiving remuneration for "significant" services.

AWARD: The grievance was allowed. The Arbitrator was of the view that telephone services provided by the Grievor constituted an integral part of his job, and found that services provided on the occasions in question constituted the Grievor being "called out" for the purpose of article 3:06. Regarding the other issue, the Arbitrator noted that the collective agreement had not been designed to deal with the issue in question. However, he did not think it reasonable or necessary to prescribe a minimum time period for the significance of a particular service. The Arbitrator ruled that the Grievor was not obliged to work a total of three hours in every twenty-four hour period; that would be unreasonable and not in line with the intent of the parties.

AUTHORITIES: None cited.

FILE NO. AA87-04-004

EMPLOYER:	The University of Manitoba
UNION:	The University of Manitoba Faculty Association
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	W.D. Hamilton, for the Employer M. Myers, Q.C., for the Union
ISSUES:	1. The Collective Agreement: Management's Duty to Act Fairly 4:2320 2. Seniority: Remedial Authority of the Arbitrator: Promotion 6:4100 3. Jurisdiction of the Arbitrator: Remedial Authority of the Arbitrator 2:1400
DECISION RENDERED:	April 8, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: Three Associate Professors had applied to the Employer for promotion to the rank of full Professor. All three applicants were recommended for promotion, but their applications were rejected. The Vice-President (Academic) had in each case made negative recommendations to the Board of Governors.

The essence of the grievances was that the Employer had violated the promotion procedures, as specified in the collective agreement, by failing to keep promotion applicants confidential and by forwarding to the Board of Governors material which might have been detrimental to the applicants, including the recommendations of the Vice-President (Academic). Further, the Union grieved that the Employer had violated promotion procedures in the agreement by delegating the authority of the Board of Governors to the Vice-President (Academic), and thereby attempting to change the specified procedures in the agreement.

AWARD: The grievances were allowed. The Arbitrator noted that the procedures whereby the matter regarding promotion came to the attention of the Board of Governors to enable it (the Board) to make its decision had been prescribed by the collective agreement. He declared that the agreement had been violated and that the Vice-President (Academic) could not be involved in promotion applications prior to their proceeding to the Board of Governors.

In view of his findings, the Arbitrator directed that the matter be referred back to the Board of Governors for consideration of the application of the three individuals. The Arbitrator noted that he was without jurisdiction to award damages or to order the promotion of the Grievors as requested in the grievances.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-005

EMPLOYER: Boeing of Canada Limited

UNION: C.A.W., Local 2169

ARBITRATOR: P.S. Teskey

APPEARANCES: J.M. Christiansen, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Warning, Discharge 7:3542
2. Leave Work Without Permission 7:3130
3. The Doctrine of the Culminating Incident 7:4310
4. The Reasonableness of the Penalty 7:4300

DECISION RENDERED: April 9, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was terminated from his employment with the Employer for leaving work without permission. He had left work approximately twenty minutes early in order to take his wife to a medical appointment.

There appeared to have been a less than amicable relationship between the Grievor and his supervisor, and the incident that led to the Grievor's termination of employment seemed to have been a consequent of such a relationship. The Grievor testified that in the course of a conversation between himself and his supervisor he requested permission to leave work early that day. According to the Grievor, his request had been simply ignored. There was a formal document for making such a request. Such a form was never filled out by the Grievor. Also, there was a procedure whereby the Grievor could have challenged his supervisor's negative response. The Grievor did not choose to do any of those things. Instead, he left work approximately twenty minutes early.

Evidence indicated that the Grievor, on previous occasions, had been warned about leaving work early. The incident was, therefore, regarded by the Employer as the culminating incident.

AWARD: The grievance was allowed in part. The Arbitrator found that discipline was warranted, but, in the circumstances, exercised his discretion to reduce the penalty. He noted that the Grievor had not fully explained the circumstances to his supervisor the next day or to an official of the Employer at the termination meeting. Likewise, in this instance, the Employer had not ascertained the full facts of the matter prior to the announcement of the penalty. As a result, the Arbitrator found that the appropriate substitution of penalty was to rescind the discharge and to substitute in its place a four-month suspension, after which time the Grievor would be reinstated to his employment.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-006

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: F.M. Steel

APPEARANCES: D. Buhr/B. Sawicki, for the Employer
G. Mendelson, for the Union

ISSUES:
1. Discipline: Suspension 7:3542
2. Insolent, Unco-operative Behaviour, Obscene Language 7:3660
3. Disciplinary Penalties: Mitigating Factors 7:4400

DECISION RENDERED: April 20, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The grievance arose out of a two-day suspension imposed on the Grievor for shouting at and for uttering profanities at his supervisor. The former and his wife were both employed by the Employer at its power plant in Point du Bois, and, at the time of the incident were having marital problems. Resolution of those problems was on the condition that the family relocate to Winnipeg.

On moving to Winnipeg, the Grievor's wife resigned her position with the Employer. When an employee resigned, the Employer filled out a form on which specific questions were asked regarding the quality of the employee's service with the Employer and whether the supervisor would recommend re-employment.

The Grievor learned that the Employer had written a negative comment about his wife's work performance, and, as a result, he became upset. In trying to discuss and to resolve the matter with his supervisor, the Grievor became belligerant and used profane language. For this reason, he was given a two-day suspension.

The Union argued that the appropriate disciplinary action would have been a letter of reprimand placed in the Grievor's file. On the other hand, the Employer maintained that in the circumstances a two-day suspension was a just and appropriate response.

AWARD: The grievance was allowed. The Arbitrator found that the Grievor had been upset and angry at the time of the incident, and so the latter's actions had not been premeditated. The factor of provocation on the part of the supervisor was considered, and the Arbitrator was satisfied that the supervisor's behaviour did not amount to provocation.

Three factors were found to be in favour of the Grievor: his satisfactory service with the Employer and an unblemished work record; the fact that he had been very upset when the incident occurred; and that it was found that less harsh treatment had been meted out to other employees who had been insubordinate in a similar manner. The Arbitrator, as a result, ruled that the two-day suspension had been inappropriate, and instead ruled that a letter of reprimand be placed in the Grievor's file. In addition, the Grievor was to receive compensation for the duration of the suspension.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-007

EMPLOYER: Kelsey School Division No. 45

UNION: Canadian Union of Public Employees, Local 1596

ARBITRATOR: P.S. Teskey

APPEARANCES: R. Simpson, for the Employer
B. Sheehan, for the Union

ISSUES:
1. Seniority: The Skill and Ability Requirement 6:3000
2. Ability and Qualifications Criteria 6:3300
3. Education and Experience 6:3320

DECISION RENDERED: April 23, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor had applied, but had not been selected, for the position of full-time custodian with the Employer. He requested the remedy of being placed into the position, as well as receiving appropriate retroactive compensation.

The Grievor held a variety of positions with the Employer. At the time of filing the grievance, he was employed as a part-time bus driver and also as a part-time custodian. The Employer indicated that the decision not to hire the Grievor was based on the fact that they felt that "ability and qualifications" had not been equal between the Grievor and the successful candidate. Accordingly, seniority did not govern, even though the Grievor had approximately thirteen years of seniority more than the successful candidate.

AWARD: The grievance was denied. The Arbitrator reviewed the requirements of the full-time custodian position and found that the individual employed as such had to work the majority of hours without supervision from the head caretaker. As well, the individual was expected to utilize "time management skills." Thus, the full-time position required a greater volume of work and a higher level of organization than the part-time position.

After hearing all the evidence, the Arbitrator was satisfied that the Grievor's experience and ability, vis a vis the particular position in dispute, neither had been relatively comparable to that of the successful candidate, nor was he satisfied that the Grievor could have stepped in and adequately perform all the duties attendant to the full-time position. Conversely, the Arbitrator was satisfied that the successful candidate had been qualified for the position.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-04-008

EMPLOYER: CML Northern Blower Inc.

UNION: United Steelworkers of America, Local 7360

ARBITRATOR: J. Atwell

APPEARANCES: B. Toews, for the Employer
D. Will, for the Union

ISSUES:
1. Organization & Direction of the Workplace: Assignment of Work Outside the Bargaining Unit 5:1000
2. Assignment of Bargaining Unit Work to Non-employees: Contracting Out 5:1300

DECISION RENDERED: April 24, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: Some time in 1986 a decision was made to repair the Employer's ten jib cranes. Repairs to the first of these cranes was assigned to the Employer's Maintenance Department, while repairs to the remaining nine were contracted out. The Union filed a grievance claiming that persons whose regular jobs were not in the bargaining unit were doing bargaining unit work and that the collective agreement, as a whole, and article 2.03, in particular, had been violated. As a remedy, it sought to have the alleged practice stopped immediately and to have all monies for work already done paid to the Union or to the affected employees.

The Employer indicated that repairs on the first crane took four months to be completed. Further, it was pointed out that the Maintenance Department had a full work load and that repairs proceeded on an "as time was available" basis. Upon evaluation of the efforts on the first crane and upon consideration of some technological issues, it was decided that it would be beneficial for the Employer to have the work done faster. The job to repair the remaining nine jib cranes was then contracted out. The Employer held that the agreement did not prohibit contracting out.

The Union's position was that the collective agreement required that the Employer meet with Union representatives to discuss contracting out before it was done. Such consultation, the Union claimed, had not been done.

AWARD: The grievance was allowed in part. The Arbitrator concluded that the issues to be decided were: did contracting out repairs to the nine jib cranes constitute a violation of the provisions of article 2:03; did contracting out the said repairs violate the provisions of article 2:04; and did the provisions of article 2:04 apply, and if so, were these provisions violated?

With regard to the first issue, the Arbitrator was satisfied that article 2:03 did not forbid the Employer from contracting out work. With reference to the issue surrounding article 2:04, the Arbitrator noted that under article 2:05 the Employer did express an intent not to sub-contract work if such work could have been performed by employees at work or by employees who may have been on lay-off at the time such work was available. The Employer also agreed that before such work was contracted out it would discuss its intentions with the Union. Article 2:04 applied since contracting out was subjected to its provisions. The Arbitrator was satisfied that the Employer did not meet with the Union as prescribed and so article 2:04 had been violated.

As a result, the Arbitrator ruled that the Union was entitled to a declaration that the Employer's decision to contract out the repairs without consulting the Union was in violation of the provisions of article 2:04. Regarding the Union's request for compensation, this was denied, as it was felt that any claim of loss remained highly speculative.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-05-001

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

BOARD: S.G. Sigurdson, Q.C., Chairperson
H. Monk, Q.C., Nominee for the Employer
H. Matthews, Nominee for the Union

APPEARANCES: R.J. Hansel, for the Employer
G. Mendelson, for the Union

ISSUES:
1. The Arbitration Process: The Establishment of the Board of Arbitration 3:1100
2. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
3. Management Rights 4:2310
4. Management's Duty to Act Fairly 4:2320
5. Jurisdiction of the Arbitrator: Applications of Estoppel 2:2220

DECISION RENDERED: May 1, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer had informed the Union of changes in "standards" with respect to a number of drilling operations. The general question to be answered in this matter was whether the Employer was entitled to unilaterally, for any reason and at any time, alter the Mines Incentive Standards, which were the basis on which "bonus" payments were made.

There was some contention regarding whether or not the matter was arbitrable. The Employer held that article 11 of the collective agreement made it clear that the establishment of standards fell entirely within its discretion. Further, the fact that a special dispute resolution procedure had been established reinforced the submission that the grievance arbitration procedure, otherwise in the collective agreement, was not available with respect to the introduction and revisions of standards. The Union contended that the Mines Incentive Bonus fell within the contemplation of article 3:01, provided the Union with the mandate to bargain, amongst other things, on the "rate of pay" and terms and conditions of employment. In support of its position, reference was made to the fact that bonus constituted "earnings", and was referred to as such, was paid monthly as part of a regular paycheque, and was ultimately related to the hourly rate of pay according to the formula from which it was calculated.

The Board of Arbitration was satisfied that the provisions of articles 3 and 11 involving the meaning of "rate of pay" and the special treatment of Mines Incentive Bonus, including their apparent limited arbitrability, raised "ambiguities" in respect of which the Board could have regard to the history of negotiations in ascertaining the intention of the parties to the collective agreement. Thus, the Board had jurisdiction to hear the grievance.

The Board heard that since 1960 many of the issues grieved in this matter were "on the table". In that year, the Board of Conciliation rejected the incentive bonus proposal submitted by the predecessor Union. From that point forward, the Union had raised the issue of the Mines Incentive Bonus, and in particular, the matter of their non-negotiability and non-arbitratbility. Despite repeated request made by the Union for negotiations and arbitrability of the "bonus", the Employer had refused to negotiate them, and they did not go into the agreement.

The Board had to deal with several "sub issues" in deciding the general question. These were matters regarding the doctrine of estoppel and its applicability in the matter; Mines Incentive standards - the conduct and representation of the Employer; nature of impending standard changes - was there an obligation to give same?; notice to revert to "street legal rights" - had same been given?; the 1985 change in standards; and consideration of tramming as either a change of "standard" or change in "policy".

AWARD: The grievance was denied. On reviewing the history of negotation between the Employer and the Union, the Board held that the record spoke for itself. They were satisfied that the agreement could not be interpreted to mean that the introduction and revision of standards either had been negotiable or arbitrable. Regarding the estoppel issue, the Board held that it was within the Employer's discretion to introduce, administer, and revise standards. However, the Employer was estopped from introducing and revising standards for reasons other than fairness and equity relating to productivity considerations in different mining activities and workplace settings.

Considering the matter as to whether there was an obligation on the part of the Employer to give the Union notice of impending changes to the standards, the Board concluded that if indeed there had been such an obligation it must flow from the application of the doctrine of estoppel. However, there was no basis on which the Employer could have been estopped from making changes to the standards unless prior notice had been given.

Regarding the matter of notice to revert to "street legal rights", the Board sought to address two issues. The first was whether the 1985 standard change was inconsistent with the representation implied and by conduct of the Employer to the Union in respect of standards which the Board had concluded fettered its discretion; and second, if inconsistent, had the Employer at any time given notice of intention to revert to its "street legal rights" under the agreement so as to bring about an evaporation of the estoppel? The Board, in response, noted that no evidence was presented to conclude that such notice regarding intention to revert to "street legal rights" had been given by the Employer. In fact, the evidence indicated a reconfirmation of the Employer's position that standards would be changed only in pursuit of equity and fairness relating to productivity consideration.

Regarding the 1985 changes, the Board was satisfied that those changes were inspired by nothing else other than fairness and equity related to production considerations. In considering the question as to whether the change in tramming, a specific mining operating in question, had been a change in policy or a change in standard, the Board found that no investigative and analytical process of a nature similar to that which had been performed in respect to other operations had been done in respect to tramming. The Board identified some concerns with this issue, but on careful consideration was not satisfied that the evidence was sufficient to enable it to make a specific finding on the matter.

The Nominee for the Employer, Mr. H. Monk, Q.C., issued reasons for dismissing the Union's grievance. His submission was simply that the Mines Incentive Bonus Scheme and the creation, the regulation, and the granting of Mines Incentive Bonus payment to employees was, by the agreement of the parties, not a matter which was within the scope of the current collective agreement. Thus, the Board did not have the power to change or amend the agreement. In his addendum to Reasons for Decision, Mr. Monk dealt with the matter of estoppel. He held that no estoppel had been created because at all material times the Employer made it known to the Union and its employees that it had reserved the right to change the Mines Incentive Bonus Standards unilaterally without regard to the provisions of the collective agreement.

DISSENT: H. Matthews, Nominee for the Union. Mr. Matthews held that the Employer had some discretion with respect to new and "temporary" standards. However, with respect to permanent standards, the Employer had no discretion whatsoever. The Nominee concerned with the Award's conclusion that the Employer's discretion was significantly fettered by the "fairness and equity" requirement, and believed it to be the correct interpretation of the parties' legal obligation to each other. Another issue identified by Mr. Matthews was whether any of the specific 1985 changes were in violation of the Employer's legal obligations to the Union and its employees. He noted that the Union did not succeed in proving any specific case with the exception of tramming, and that the changes were made for reasons other than fairness and equity related to productivity changes. Regarding the question of tramming, the Nominee believed that there had been a policy change and that same had been a violation of the collective agreement.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-05-002

EMPLOYER:	The Province of Manitoba
UNION:	The Manitoba Government Employees' Association
ARBITRATOR:	S.G. Sigurdson, Q.C.
APPEARANCES:	O. Zabloski/R. Cram, for the Employer B. Havelock, for the Union
ISSUE:	The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
DECISION RENDERED:	May 1, 1987
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, an archaeologist, had been employed as a term employee since 1982. The thrust of his argument was that he had been continuously performing the "function" of a professional since he was first employed in 1982. Depending on the particular assignment, there may have been a different emphasis in particular skill, but throughout he had been continuously practicing his profession. On one such assignment, the Souris Mouth Project, he had been employed for more than 24 months. Well over 24 months had elapsed, and there was no reason to expect that the archaeological function would not continue. The Grievor wanted to know why he had not been converted to regular civil service status. Article 5:04 of the collective agreement stated in part that:

> Where a term employee is employed in the same position performing the same function for a period of more than twenty-four (24) continuous months and where the need for the function is expected to continue, the Government will convert the position to regular civil service status . . .

The Employer's response was that the Grievor had not been employed at his prior position as Project Archaeologist for 24 consecutive months, and further, in his position with the Souris Mouth Project, where he had been employed for 24 continuous months, the need for the function was not expected to continue.

AWARD: The grievance was allowed. The Arbitrator reviewed the meaning of the words, "function" and "position". He was satisfied that the only reasonable interpretation of article 5:04 was that a distinction had been intended. What appeared to have been contemplated, according to the Arbitrator, was that a person is employed for a position, as opposed to a function, and performs a function, not a position.

Regarding the Souris Mouth Project in which the Grievor had been employed for more than 24 months, the Arbitrator reviewed the Employer's argument that, "the need for the function was not expected to continue." His conclusion was that while the "position" was not expected to continue, on the evidence, he had no reason to conclude that "function", other than the need for the performance of such archaeological duties in one position or another, was expected to continue. Further, the Grievor's assignment immediately thereafter and his then current assignment reinforced that fact.

The Arbitrator ruled that with respect to the Grievor's prior position as Project Archaeologist he was not entitled to be converted to regular civil service status because he did not hold that position for more than 24 months. However, the Arbitrator found that the Grievor should have been converted to regular civil service status after having been employed in his position on the Souris Mouth Project, in excess of 24 months, where he had been performing the same function throughout.

AUTHORITIES: None cited.

FILE NO. AA87-05-003

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: P. Phillips

APPEARANCES: M. Samphir/B. Sawicki, for the Employer
R. Malazdrewich, for the Union

ISSUES: 1. Compensation: Premium Rates and Bonuses: Overtime 8:2100
2. Daily Overtime 8:2110

DECISION RENDERED: May 15, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, the regular foreman on the dayshift at the facility, travelled to Brandon on Friday, November 14, 1986. He told his supervisor that he would be back "late Friday night" and would be available for call-in on the weekend. On the weekend, shifts were instituted, but the Grievor claimed that he had not been called to work overtime on the weekend of November 15 and 16, 1986. This, he claimed, was contrary to article 19.10 of the collective agreement, which stated that:

> Where overtime work is required, the City agrees to the dividing of hours of overtime, where practical, among employees who normally perform the available work.

The Grievor claimed that he was home all day on Saturday awaiting the expected call, but same did not arrive. The supervisor, on the other hand, testified that he did phone the Grievor on the morning in question with the intention of asking the latter to come in to catch up on some paperwork that he, the supervisor, had told the acting foreman to leave for the Grievor. He claimed that he did not reach the Grievor.

AWARD: The grievance was allowed in part. The Arbitrator found "dividing of overtime" in article 19.10 to be a very ambiguous term, but concluded that the term was to be interpreted to mean the equitable division of overtime. In the Arbitrator's view, the critical issue was the application of the phrase, "where practical", or in other words, was it practical, fair, or reasonable for the supervisor and other employees to wait until the Grievor returned before learning what (or even if) their shift was the next morning. The Arbitrator thought it was not practical, fair, or reasonable. However, the same could not be said for the Sunday, as the Grievor could have been incorporated into the Sunday shift. The issue respecting individuals who normally perform the available work, according to the Arbitrator, raised a number of sub-issues and sought to answer the question: was overtime to combat an abnormal situation the same as scheduled overtime to catch up on a backlog of regular work? The Arbitrator noted that an acting foreman was appointed, and so, a foreman's work was available, and so, the Employer's contention that foremen were not necessary in some call out situations was irrelevant.

The grievance succeeded with respect to the Sunday shift only, and the Arbitrator ordered that overtime, adjusted accordingly, be paid to the Grievor.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration** (2nd ed.) pp. 257-258; and Palmer, **Collective Agreement Arbitration in Canada** (2nd ed.) p. 641.

FILE NO. AA87-05-004

EMPLOYER: The Brandon Sun

UNION: Media Union of Manitoba

BOARD: D.E. Bowman, Q.C., Chairperson
A. Wilton, Nominee of the Employer
C. Carlson, Nominee for the Union

APPEARANCES: J. Janzen, for the Employer
G. Mendelson, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Policy Grievances 2:3124
2. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100

DECISION RENDERED: May 19, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer and the Union had entered into an agreement, which contained, among other things, article 13:04, which, in part, provided as follows:

> No news photographer shall be required to take photographs other than for the editorial department . . .

While the agreement was still in effect, the Employer issued a directive, which, in part, stated that:

> In future the editorial department photographers will be expected to develop film and print pictures for the advertising department.

The Union raised an objection over the directive. To the Union, to "take" a photograph involved the entire process from the pointing of the camera at an object and the snapping of the shutter to the entire process leading to a finished product, as was being done in the editorial photographer's regular job. It considered the photographers to be news photographers and not darkroom technicians for the advertising department.

To the Employer, "taking" a photograph involved simply the process of pointing the camera at an object and snapping the shutter in order to record the image of the film within the camera. Thus, the meaning of "taking" a photograph was in conflict.

AWARD: The grievance was allowed. Regarding the meaning of "taking" a photograph, the Board noted that the Employer's interpretation was the more pre-eminent one, but was not so dominant that it would oust the interpretation advanced by the Union. It appeared to the Board that the Employer at no time during the negotiations expressed to the Union its own view of the interpretation of the proposed clause. In the view of the Board, in the context of the agreement, the clause certainly meant what the Union said it had meant.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-05-005

EMPLOYER:	Dominion Bridge Co., Ltd.
UNION:	United Steelworkers of America, Local 4095
ARBITRATOR:	F.M. Steel
APPEARANCES:	J. Youngman, for the Employer D. Will, for the Union
ISSUES:	1. Organization & Direction of the Workplace: Distribution of Work Within the Bargaining Unit 5:2000 2. The Collective Agreement: Management Rights 4:2310
DECISION RENDERED:	May 28, 1987
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: A normal team working in the Beam and Column Department consisted of a group leader, a dispatcher, and at least one fitter-welder. Between February 9, 1987, and March 6, 1987, some work was left over, sufficient for a night shift, but not for a full team. Consequently, the night shift operated for one month with a group leader and a fitter-welder, but not a dispatcher. The Grievors, who were both dispatchers, were transferred to other duties, which were classified at a lower rate of pay.

The Union argued that a dispatcher was the essential member of the team, and that the supervisory duties of a group leader were unnecessary, given that there was a shop foreman supervising the overall plant operation on the night shift. Therefore, the Employer should have laid off the group leader and kept on the dispatcher. The Employer's action was regarded by the Union as a lay-off, and the latter claimed that there had been a violation of the seniority provision of the collective agreement.

The Employer submitted that it decided not to have a dispatcher on the night shift because there was insufficient work to keep a dispatcher busy for a full shift; that a group leader was a necessary part of the team; and that the group leader had both the time, the ability, and the right to perform dispatch duties. The Employer regarded its action as a transfer.

AWARD: The grievance failed. According to the Arbitrator, if the Union could have shown that the dispatch duties performed by the group leaders in the month in question made the group leaders, in effect, dispatchers, then the grievance may have succeeded. The Arbitrator heard that the tasks of the group leader overlapped with that of the dispatcher. By eliminating the positon of dispatcher from the night shift for the month in question, the group leader, of necessity, had to spend more of his time doing dispatch work. That did not mean that the group leader took over the position of the dispatcher. His other duties as group leader continued. Based on the evidence, the Arbitrator was satisfied that there had been no qualitative change in the position of the group leader. It had not been established that the group leader functioned outside his classification, and there had been no violation of the seniority provision of the collective agreement.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration** (2nd ed.) p. 200-201; **Brendan Construction Ltd.** 1980, 28 L.A.C. (2d) 375 (Palmer); and **Re United Steelworkers and Algoma Steel Corp.** (1968), 19 L.A.C. 236 (Weiler).

FILE NO. AA87-06-001

EMPLOYER: Health Sciences Centre

UNION: Canadian Union of Public Employees, Local 1550

BOARD: J.M. Chapman, Q.C., Chairperson
G.D. Parkinson, Nominee of the Employer
J. Peterson, Nominee for the Union

APPEARANCES: W.S. Gardner, Jr., for the Employer
R. Tonn, for the Union

ISSUES: Jurisdiction of the Arbitrator: Settlement 2:3230

DECISION RENDERED: June 3, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: No viva voce evidence was called in this arbitration, as counsel advised the Board that the matters relating to the grievance had been resolved. The circumstances of the matter were not given but indications are that the Grievor had been suspended and subsequently terminated from his employment.

However, the Board, at the request of counsel and with their concurrence, made findings and orders on specific issues relating to the grievance.

AUTHORITIES: None cited.

FILE NO. AA87-06-002

EMPLOYER:	The Government of Manitoba
UNION:	The Manitoba Association of Crown Attorneys
ARBITRATOR:	P.S. Teskey
APPEARANCES:	E.W. Olson, Q.C., et al, for the Employer A.R. McGregor, Q.C., et al, for the Union
ISSUES:	Arbitration of Grievances (Interest Arbitration) 1:0000
DECISION RENDERED:	June 5, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The matter was brought to arbitration to set the terms and conditions of the collective agreement that would replace the previous agreement which expired in September 1986. Negotiations between the Union and the Employer had failed to realize a settlement. Several matters had already been resolved, but others were still in dispute.

Article 6:02 read: "First consideration for filling vacancies within the bargaining unit shall be by promotion or transfer from within the bargaining unit." The Employer requested that the provison be deleted because, it claimed, the clause hampered the recruitment of new attorneys by giving the bargaining unit an advantage over outside attorneys.

The Union wanted an amendment to article 16:13. The article provided for one day's leave with pay for a male employee to attend to needs directly relating to the birth of his child. The request was that such time be extended to three days with pay because the Union felt that one day was insufficient.

Sick leave was the subject of article 20. The Union requested a form of sick leave cash-out for pay-out to an employee, who resigned after five years of service or more, of an amount equal to the present rate of pay at the time of the resignation multiplied by the number of days of sick leave accumulated. The Employer rejected the notion on the basis that there was an additional benefit in the existing agreement for severance pay based on years of service.

Article 21 provided for the granting of a maximum of one day, without loss of salary, as compassionate leave. The Union requested that the limit be extended to three days.
Another issue in dispute was the Long Term Disability Plan. Under the previous plan, benefits up to a maximum of $3,000 per month were provided. The Union's position was that article 32, the article in question, be changed so that other private coverage was not subrogated to coverage under the plan.

A dispute arose over new articles, namely, Legal Education and Deferred Salary Payment Plan. With regard to Legal Education, the Union requested that $1,000 be allowed per person after five years of service for all provable expenses arising out of continuing education. Regarding the second article, the Union proposed under the plan that:

> Provisions be made to allow a member of the bargaining unit to defer salary to be paid during a period of absence. A percentage of salary would be set aside for 4 years, so that in the 5th year the employee might have a year's leave of absence while receiving a percentage of salary.

The Employer was not opposed to the plan, but disagreement arose as to its operation.

The issues of wage increase and classification also came up for settlement. That the actual wage increase would be retroactive was not in dispute. The Union requested that interest be paid upon any retroactive pay increase. However, there was no written request put forward by the Union either for interest to be payable or for the inclusion of a retroactive interest clause within the agreement itself to govern future situations. The Employer argued that the Arbitrator was without jurisdiction to award same, given the lack of such an initial request. The suggestion was made by the Union that the Directors of the Family Law and Constitutional Law branches be placed into a higher classification. Previous to this, no written request had been submitted by the Union.

The final issues dealt with by the Arbitrator were those of accelerated salary program, increments, and rates of pay in general. The Arbitrator noted that there were three issues to be determined: what general salary adjustment should apply and with respect to what classifications; whether or not additional increments were to be awarded to the three more senior classifications; and whether the accelerated pay plan for junior attorneys was to continue at all. While the Union relied heavily upon comparisons with federally appointed judges who in ten years saw their salaries slightly more than doubled, the Employer placed its greatest emphasis upon comparisons with other provincial civil servants, all of whom had agreed to a basic cost-of-living increase.

AWARD: Regarding the issue of recruitment, pursuant to article 6:02, the Arbitrator did not find the requirement for "first consideration" to be unduly restrictive. Accordingly, the Employer's request regarding this matter was denied.

After considering the argument of both parties on the Paternity Leave issue, the Arbitrator directed that article 16:13 be revised to read as follows:

> A male employee may be granted up to a maximum of two day's leave with pay, to attend to needs directly relating to the birth of his child.

The Arbitrator did not see the need to maintain the designation of specific days towards which the leave would be applied.

The settlement on the question of sick leave, article 20, was that the provisions did not change as the Union's request was denied. The Arbitrator did not think it appropriate to award the request of the Union.

The Union's request for extending compassionate leave from one to two days with pay was denied. The Arbitrator was not convinced by the evidence that there was any material difficulty with the article as it then existed.

Regarding the Long Term Disability Plan issue, there had been some agreement that further representation would be made to the Employer on behalf of the Union on the issue. The Arbitrator directed that same be done. He did not rule on the issue.

The Arbitrator was without jurisdiction to rule on the Legal Education issue. However on the Deferred Salary Payment Plan issue, there was dispute regarding how many individuals may utilize the plan at any given point in time. The Arbitrator accepted the Union's position that five percent of the employee group should be allowed to participate in each year. The Employer's position was that five percent should be allowed to enter the program, complete the five-year program, and only then should the next group commence.

Likewise, the Arbitrator accepted the Union's position on the selection process. The Union proposed that seniority should be the rationale for selection as opposed to a first come, first serve basis, proposed by the Employer. The Arbitrator directed that a return to work agreement form part of the plan, and, likewise, that a provision that members on leave be prohibited from acting in competition with or adverse in interest to the Employer in the year of leave or in future.

Regarding rates of pay, the Arbitrator directed that there should be a general percentage increase of 44 percent for all increments within all classifications, retroactive to the date of termination of the previous agreement. He further directed that an additional one percent be granted to higher level legal counsel. He noted that lower classifications of counsel had much greater potential for further advancement, whereas the higher levels did not. The Arbitrator declined to order additional increments to the senior levels of counsel as he had already adjusted same.

The Arbitrator directed that article 7:05, Accelerated Pay Plan, be deleted from the agreement effective with respect to all new members of the department entering subsequent to August 1, 1987. The Arbitrator was not prepared to disturb the system until then, because he believed that career choices had been made based on the then current system.

AUTHORITIES: None cited.

FILE NO. AA87-06-003

EMPLOYER: Lucerne Foods Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: J.F. Atwell

APPEARANCES: J. Witiuk, for the Employer
D. Dziewit, for the Union

ISSUES:
1. Discipline: Warnings, Suspensions, Discharge 7:3542
2. Attendance at Work: Innocent Absenteeism 7:3210
3. The Final Incident 7:4312

DECISION RENDERED: June 18, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor had a work record characterized by a number of problems including insubordination, fighting, tardiness, and absenteeism. The Employer had discussed those problems with Union representatives over a four-year period. As a result of those discussions, the Employer and the Union agreed by letter to a special resolution applicable to the particular case involving the Grievor, and that progressive discipline could include the following six steps: verbal counselling, written reprimand, three-day suspension, one-week suspension, two-week suspension, and termination of employment.

After repeated warnings and having reached the sixth step of the progressive discipline schedule, the Grievor was discharged for what the Employer regarded as excessive absenteeism. The former alleged that he had been unjustly dismissed.

The Employer argued that the agreement regarding progressive discipline had been reached to deal specifically with the Grievor and his related problems. Such an agreement gave the Grievor the opportunity to clear his records. If he did not, the agreed result would be termination of his employment. It was the Employer's contention that in this matter the scope of the Arbitrator's review was limited to whether the Grievor had met the conditions set out in the letter (of agreement) for maintaining continued employment with the Employer.

The Union argued that because the Grievor's absence was due to illness he had no control over that particular circumstance. They agreed that no employer could discipline for justifiable absence due to illness. The Union further held that all the letter of agreement did was recognize the Common Law with resepect to progressive discipline. In addition, the letter did not set out how plant averages were to be calculated for determining excessive absenteeism.

AWARD: The grievance was dismissed. The Arbitrator was satisfied that the letter of agreement was fashioned to deal with the special case of the Grievor in light of his history of an accumulation of disciplinary problems. Thus, both parties had perceived the performance of the Grievor as constituting a problem. In light of the above, the Arbitrator was satisfied that the letter provided the basis for determination of disciplinary measures to be applied to the Grievor. The Arbitrator rejected the Union's contention that the letter did not specify how averages were calculated, and noted that the Employer had indicated that averages for absence calculated on the same basis had been used in the past for disciplinary purposes. The Arbitrator, in light of the Grievor's performance leading up to the agreement, and in light of his satisfaction that the Employer did, in fact, abide by the agreement, found that the termination was for just cause.

AUTHORITIES: None cited.

FILE NO. AA87-06-004

EMPLOYER: INCO Ltd. (Manitoba Division)

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: P.S. Teskey

APPEARANCES: J.M. Christiansen, et al, for the Employer
G. McMillan, et al, for the Union

ISSUE: Jurisdiction of the Arbitrator: Missed Overtime Opportunities 2:1423

DECISION RENDERED: June 22, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor alleged that he had been denied the opportunity to work an overtime shift that he had previously agreed to work. As a remedy, he requested that the "unjust practice" cease and that he be paid all monies and benefits lost.

His regular shift was from 7:00 a.m. to 3:00 p.m. He had made arrangements to work on two consecutive days from 3:00 p.m. to 11:00 p.m. on an overtime basis. On the first of those days, he missed the start of his regular shift, and was replaced with another employee. However, he was allowed to work the afternoon shift as agreed upon. The following day the Grievor again missed the start of his regular shift, and again was replaced by another employee for that shift. The Grievor nevertheless contacted the supervisor, and asked if he was to appear for the regular shift on that day, and was told not to appear. The supervisor did not know that the Grievor had made prior arrangements to work the afternoon shift. The Grievor drew the conclusion that he was told not to appear for work at all that day, and as a result, filed the grievance.

AWARD: The grievance was denied. The Arbitrator held that it was incumbent upon the Grievor to again contact the supervisor for clarification prior to the commencement of the afternoon shift. This should have been done in light of the fact that the almost identical set of circumstances had occurred the previous day. The Employer had not denied the Grievor the opportunity to work overtime, but rather the Grievor in many ways was responsible for his own misfortune.

AUTHORITIES: None cited.

FILE NO. AA87-06-005

EMPLOYER: Manitoba Crop Insurance Corporation

UNION: The Manitoba Government Employees' Association

BOARD: M.H. Freedman, Q.C., Chairperson
R. Whiteway, for the Employer
L. Sigurdson, for the Union

APPEARANCES: O. Zabloski, for the Employer
R. Cannon, for the Union

ISSUE: The Arbitration Process: Specific Applications of the Burden of Proof: Classification 3:2414

DECISION RENDERED: June 25, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was classified as an Accounting Clerk I before she went on maternity leave. On her return, she believed that her duties had changed. She claimed that her former duties had expanded so that she was no longer responsible for merely the "per diem" payroll, but also for the regular payroll. In addition, she claimed other duties had been assigned to her. She, thus, requested reclassification from Accounting Clerk I to Accounting Clerk II.

The Employer took the position that the Grievor's actual job functions were more accurately described by the class definition of Accounting Clerk I position than that of Accounting Clerk II position. The Accounting Clerk II position required responsibilities that the Grievor had not been fulfilling.

AWARD: The Board made reference to what was described as the "substantially the central core" test, which held that an employee seeking a higher classification must not only identify aspects of the higher classification which she performs, but should likewise demonstrate that the higher classification is the right one.

After considering the evidence before them, the Board was satisfied that there were a number of functions on the class definition of an Accounting Clerk II which the Grievor did not perform and which seemed to them to be central to the function of an Accounting Clerk II. The grievance was dismissed.

AUTHORITIES: **Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union** 13 L.A.C. (433 and 435).

FILE NO. AA87-06-006

EMPLOYER: The City of Winnipeg

UNION: Amalgamated Transit Union, Local 1505

BOARD: D.E. Bowman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
D.M. Shrom, Nominee for the Union

APPEARANCES: M. Samphir, Q.C., for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Dishonesty: Theft 7:3810
2. Abrogation of Seniority Rights 7:4230
3. Seniority: Duration & Loss of Seniority 6:1200
4. Jurisdiction of the Arbitrator: Limits to the Arbitration of Grievances: Arbitrability: Prior Award 2:3220

DECISION RENDERED: June 29, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The grievance arose from a longstanding difference between the parties with respect to the status and future of the Grievor. He had been a bus driver for the Employer, and was discharged in December 1982, as a result of allegations of theft. The discharge was grieved, and was set aside. Instead, a one-year suspension followed by a reinstatement, not as a bus driver, but in the maintenance or other areas of the Employer's operation, was substituted. This judgment was handed down in October 1984.

Approximately one year later, the Grievor appeared at the sign-up for bus drivers to seek his choice of routes, and was refused permission to do so. As a result of that incident, the matter was referred back to the original Board, and a supplementary award was handed down. The issue of concern in the latter award was whether the Grievor was entitled to exercise his seniority status on the seniority list then and return, as a matter of right, to the position of bus driver. In the supplementary award, the Board ruled that whatever seniority credits the Grievor enjoyed prior to his suspension he continued to enjoy and was entitled to seek reinstatement as a bus driver.

Despite the ruling in the supplementary award, the matter still was not settled. The Union and the Grievor were satisfied that the Grievor had preserved the seniority as a bus driver which he enjoyed immediately prior to his discharge. Thus, once the one-year suspension had expired, he was entitled to exercise his rights as a bus driver. In the view of the Union, the Grievor's return to the position of bus driver was automatic. The Employer's position was that they were entitled to make a determination as to the Grievor's qualifications as a bus driver on whatever grounds and using whatever criteria they chose.

AWARD: The grievance was denied. The Board held that it would have been presumptuous on their part to suggest precisely what the Grievor and the Union should have done in order to raise the question of the Grievor's qualification to be a bus driver and have it appropriately determined. Similarly, the Board felt that they were not entitled to direct the Employer as to what criteria they should have considered, or whether they could or should have laid down in advance any tests or guidelines for the Grievor. However, in the event of an application coming before the Employer, it should be treated with fairness and reasonableness and without any discrimination. Likewise, the Employer should bear in mind the danger of confusing the position of one pardoned for a criminal conviction, as opposed to one granted a discharge.

DISSENT: D.M. Shrom, Nominee for the Union. It was Mr. Shrom's opinion that the Grievor had seniority as a bus driver and that he had met the objective written qualifications to qualify as a bus driver. The issue for further determination was whether the Grievor was qualified in the sense that he had cleared the cloud of dishonesty relating to the previous imposition of the penalty. The Employer, according to the Nominee, had attempted to suggest that the answer to that question was negative, but offered no specific explanation to support that position. Mr. Shrom held that the Employer perhaps had not assessed the Grievor's qualifications. Accordingly, the Nominee would have allowed the grievance in the terms requested by the Union. At the very least, he would have remitted the decision regarding the Grievor's qualifications back to the Employer for proper consideration.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-07-001

EMPLOYER: The City of Winnipeg

UNION: The Winnipeg Police Association

BOARD: P.W. Schulman, Q.C., Chairperson
H.G. Piercy, Nominee for the Employer
M. Myers, Q.C., Nominee for the Union

APPEARANCES: M. Samphir, Q.C./M.E. Cavett, for the Employer
A.R. McGregor, Q.C., for the Grievor

ISSUES: 1. Jurisdiction of the Arbitrator: Remedy for Improper Promotion 2:1460
2. Prior Award 2:3220

DECISION RENDERED: July 3, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: This matter had previously been before arbitration. The Grievor had sought to obtain a promotion from Sargeant II to Sargeant I in the Winnipeg Police Force. The issue then before the Board was whether the Grievor had lost his rights to a promotion, given a demotion to Special Constable following a criminal conviction. In that award, the Board found that there was nothing contained in the collective agreement or in the rules relating to promotion in the Winnipeg Police Department where by virtue of the Grievor's demotion, he was moved out of the slot which he had earned as a result of the competition. Further, the Board ordered that upon the occasion of the next vacancy in the position of Sargeant I the Employer was to consider and make a decision on the candidacy of the Grievor.

The present grievance was brought as a result of the Employer not having not followed the order of the Board. The task of the Board in this matter was to decide whether or not the candidate should be awarded the position of Sargeant I, and, if so, when and under what conditions.

AWARD: The grievance was allowed. The Board heard, among other things, that the Grievor had rehabilitated himself to a commendable extent and had performed the functions of Sargeant I in an acting capacity about 40 percent of his working time since

DISSENT: H.G. Piercy, Nominee for the Employer. Mr. Piercy's principal objection was that the Grievor had not been the best candidate for the position, having scored 38th in a field of 86 candidates for the position in the fall of 1986. He found it contradictory that the award had said that the results of the competitions subsequent to February 1983, when the Grievor had been judged as one of the best candidates, were before the Board, and then it (the Board) proceeded to award the position to the Grievor notwithstanding the relatively poor results achieved in those competitions.

DISSENT: M. Myers, Q.C., Nominee for the Union. Mr. Myers agreed with the content of the award with the exception of the position where no compensation had been awarded to the Grievor. In Mr. Myers' view, it was unjust and inequitable, having regard to the manner in which the Grievor had been treated, to deny him compensation. The Nominee for the Union would have awarded compensation from May 14, 1986, the date of the first vacancy following the majority decision of the Board when the Employer was required to consider the promotion of the Grievor.

AUTHORITIES: Prior award of the said Board dated May 2, 1986.

FILE NO. AA87-07-002

EMPLOYER: The University of Manitoba

UNION: The University of Manitoba Faculty Association

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: W.D. Hamilton, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Employer Responses Other Than Termination 7:3240
2. The Employee: Rehabilitative Potential 7:4422
3. Multiple Penalties 7:4240
4. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100

DECISION RENDERED: July 8, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: As a consequence of unspecified events, the Employer decided that the Grievor was to be dismissed. However, the Union intervened on behalf of the Grievor, and as a result, the penalty was reduced to a one-year suspension without pay. The penalty was divided such that for the first half of the year the Grievor was regarded to be on suspension without pay and the second half as being on an enforced leave of absence without pay. The purpose of charaterizing the second half of the penalty as leave of absence without pay was to allow the Grievor to participate in the benefit plan for at least half of the year.

After the lapse of the first half of the penalty, the Grievor filed a grievance alleging that he had not been granted any of the academic rights of a member on leave of absence without pay. He sought as a remedy immediate restoration of all rights normally accorded to members on leave of absence without pay. He claimed that forfeiture of those rights applied only to the period of the suspension, which he understood to mean the past six months of the period of discipline.

AWARD: The grievance was denied. The Arbitrator, considering the context in which the disicpline was imposed, was satisfied that the Grievor had been removed from teaching for one year with the second half characterized exclusively for the Grievor's benefit in such a manner as to accord him a particular status. Thus, the leave of absence in this case was not normal. In the Arbitrator's view, it would be a serious misinterpretation of the collective agreement if during the latter six months of the duration of the penalty those rights available to a typical member on a leave of absence accrued to the Grievor.

AUTHORITIES: **Re Northern Electric Co. Ltd. and United Automobile Workers, Local 1535** 1 L.A.C. 310 at p. 312.

FILE NO. AA87-07-003

EMPLOYER:	The University of Manitoba
UNION:	The University of Manitoba Faculty Association
ARBITRATOR:	D.E. Bowman, Q.C.
APPEARANCES:	W.D. Hamilton, for the Employer R. Tonn, for the Union Y.M. Henteleff, Q.C., for Dr. Jefferson
ISSUES:	1. Jurisdiction of the Arbitrator: Prior Award 2:3220 2. Damages 2:1410 3. Exhaustion of Jurisdiction: 2:4000
DECISION RENDERED:	July 8, 1987 (Reconsideration of Decision Rendered on March 30, 1987)
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Union requested that further consideration and clarification be given to a portion of a prior award, dated March 30, 1987, with respect to the issue of remedy.

The Union noted that the Arbitrator, having found that the Employer had violated the provisions of the collective agreement, had merely contented himself with making a simple declaratory award to that effect. However, the argument was raised that under subsection 109(4) of **The Labour Relations Act** it was open to the Arbitrator, both in the original award and, likewise, in the present award, to consider the possibility of awarding damages to the Grievor as part of the appropriate remedy.

The Employer argued that under the doctrine of functus officio, the award was complete and, so, the Arbitrator was without authority to go further. In the alternative, the Employer argued that the evidence could not demonstrate a legitimate claim to damages on the part of the Grievor.

AWARD: The grievance was denied. According to the Arbitrator, it was not his intention in the original award that the parties might consider between themselves any further remedy for the Grievor. His reference to further discussion related to whether steps might be needed to prevent a further violation in the conduct of appointment search committees. The Arbitrator found that the award as delivered was not incomplete. Besides, he found that the evidence before him could not justify any monetary award in favour of the Grievor. As a result, the Arbitrator declined to re-open the arbitration, to hear further evidence, or to make further order.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration** (2nd ed.); and **The Labour Relations Act**, s. 109.

FILE NO. AA87-07-004

EMPLOYER: Victoria General Hospital

UNION: Manitoba Paramedical Association

BOARD: M.H. Freedman, Q.C., Chairperson
P. Kremer, Nominee for the Employer
J. Peterson, Nominee for the Union

APPEARANCES: W.S. Gardner, for the Employer
P.S. Teskey/K.L. Lercher, for the Union

ISSUES:
1. Organization & Direction of the Workplace: Change in Job Function 5:2410
2. Standard of Proof 5:2430
3. The Arbitration Process: Classification 3:2414

DECISION RENDERED: July 10, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Four individual grievances were heard in this arbitration. It was agreed evidence presented would apply mutatis mutandis regarding each grievance. Each Grievor sought reclassification as each claimed that she had been improperly classified as her respective duties had changed since the last classification. Reclassification was sought from Technician 1 to Technician II, Technician II to Technologist I, and Technologist I to Technologist II on behalf of the Grievors.

The Employer had argued that there had really been no change in duties of the four Grievors. New machines had been introduced, but their functions have essentially remained the same.

AWARD: Three of the grievances were allowed, while one was denied. Regarding the Grievor who sought reclassification from Technician I to Technician II, the Board found that the Grievor's job was essentially the same as another classified as Technician II. In addition, she was performing work requiring greater ability than that of a Technician I. She, thus, should be classified as a Technician II. With reference to the Grievors seeking reclassification from Technologist I to Technologist II, a majority of the Board was satisfied that they performed work that was of "greater responsibility" than that performed by a Technologist I, as cited in article 3.03 of the collective agreement to describe the classification of Technologist II. After considering the evidence and the arguments raised, the Board was satisfied that the Grievor who sought reclassification from Technician II to Technologist I did not have the technical certification for a Technologist I. Besides, the evidence did not disclose that she was performing the duties comparable to those of a Technologist I.

DISSENT: P. Kremer, Nominee for the Employer. Mr. Kremer disagreed with the dispositon of the award as it related to the grievance of the two grievors who sought and received reclassification from Technologist I to Technologist II. In his opinion, the majority erred in concluding that the central core of their work was substantially that of a Technologist II.

AUTHORITIES: Palmer, **Collective Agreement Arbitration in Canada** (2nd ed.) p. 477; **Re Dominion Stores Ltd. and Retail, Wholesale & Department Store Union** 13 L.A.C. (433 at 435); and **Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43** 13 L.A.C. (3rd 248).

FILE NO. AA87-07-005

EMPLOYER: Brandon University

UNION: Brandon University Faculty Association

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: Not Listed

ISSUE: Jurisdiction of the Arbitrator: Settlement 2:3230

DECISION RENDERED: July 14, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was appointed as Professor of Chemistry at the time of his hiring in 1977. He was dismissed as President in November 1983, and was offered a professorship in Chemistry, which he did not accept. As a result of his dismissal, the Grievor filed a law suit against the Employer. An agreement was entered into by the two parties as an intended resolution to the law suit. The Union filed a grievance with respect to various provisions of the agreement.

AWARD: Among other things, the Arbitrator found and ordered that the Grievor had tenure from the time of his initial appointment, and after his dismissal as President came under the collective agreement. Therefore, the Grievor could only be dismissed in accordance with the collective agreement. The Arbitrator found the transfer of the Grievor into the Department of Extension to be effective because the Grievor and the Department both consented to same.

Amendments were made to the agreement. First, the provisions regarding the assignment of workload were revised to be in accordance with the collective agreement. Second, the exemption of the Grievor from the Pension Plan was revised to allow the Grievor to participate in the plan. Finally, the Grievor's leave during 1986-87 was characterized by both parties as administrative leave rather than sabbatical.

AUTHORITIES: None cited.

FILE NO. AA87-07-006

EMPLOYER:	The City of Winnipeg
UNION:	Winnipeg Police Association
BOARD:	M.H. Freedman, Q.C., Chairperson H.G. Piercy, Nominee for the Employer M. Myers, Q.C., Nominee for the Union
APPEARANCES:	M. Samphir, Q.C./M.E. Cavett, for the Employer A.R. McGregor, Q.C., for the Union
ISSUES:	1. Compensation: Overtime Work 8:2130 2. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100 3. Interpretation of Collective Agreements: Prior Awards & Judicial Decisions 4:2220
DECISION RENDERED:	July 15, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor was the Co-Chairperson of the Police Department's Committee on Workplace Safety and Health. The Grievor attended a meeting of the Committee as Chairperson at a time when he was off duty. He then submitted an overtime claim but this was rejected by the Employer.

The Union raised the argument that the Employer was practicing discrimination by paying on-duty members who attended the same meetings and refusing to pay off-duty members for attending. Likewise, the Union regarded the Grievor's attendance at meetings when off duty as a "call-back", because there was no discretion on his part to attend or not to attend those meetings.

The Employer's position was that there was no obligation on the part of an employee to attend Committee meetings, such attendance was voluntary. As such, the Grievor was not required by the Employer to be there, and if the former declined to attend, he could not be disciplined in any way.

AWARD: The grievance was denied. A majority of the Board found that attendance at committee meetings could not amount to a call-back, and as such, the agreement did not impose a duty on employees to attend those meetings outside working hours.

Further, the Board did not consider it discriminatory as contemplated by the collective agreement or **The Labour Relations Act** to decline to pay an employee who, on his own time, chose to attend a committee meeting.

DISSENT: M. Myers, Q.C., Nominee for the Union. Mr. Myers held that the allegation of discrimination by the Grievor was a grievance within article V(2) of the collective agreement as related to his working conditions. Also, he noted that section 10 of **Manitoba Regulation 158/77, under The Workplace Safety and Health Act**, provided that where an employee attends a workplace safety and health meeting during working hours, such attendance shall be deemed to be service performed, and, accordingly, the Employer will pay him for the period of time spent at the meeting. Thus, such activity was "work" whether the employee was on or off shift. Further, under section 5 of the **Regulation**, the Grievor was required to attend as Co-Chairperson, and, so, was entitled to compensation for all time he spent at such meetings.

AUTHORITIES: **Re Smyrski, et al, and The City of Winnipeg**, M.L.B. dec. Mar. 1, 1985; **Re Perley Hospital and Ontario Nurses Association**, 29 L.A.C. (2nd) 178; and **Re Cliffs of Canada Ltd. and United Steelworkers**, 1 L.A.C. (2nd) 48.

FILE NO. AA87-07-007

EMPLOYER: LaSalle Hotel

UNION: Hotel and Restaurant Employees and Bartenders Union

ARBITRATOR: P.W. Schulman, Q.C.

APPEARANCES: A.R. McGregor, Q.C./E. Andres, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Dishonesty: Theft 7:3310
2. Intoxicants 7:3560
3. Burden of Proof 7:2300
4. The Reasonableness of the Penalty 7:4300
5. Economic Hardship 7:4426

DECISION RENDERED: July 15, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor worked as a waitress for the Employer for about six years. She was discharged after allegations that she had materially altered her daily receipt form and failed to turn in the appropriate sum of money as required. The Grievor held that she had turned in the correct sum of money, and suggested that she had been set up.

AWARD: The grievance was denied. On the basis of the evidence presented by several witnesses for the Employer, the Arbitrator concluded that the case against the Grievor had been established to a point where it was clear and concise. In consideraton of the reasonableness of the penalty, the Arbitrator, after considering the nature of the theft, found it inappropriate to reduce the penalty, because the Grievor was aware that her actions comprised a breach of the Employer's rule. The Arbitrator further considered that recruitment of the Grievor would lessen the respect for the authority of the Employer. Also, given the circumstances, the other employees would not be able to trust the Grievor or work harmoniously with her.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-08-001

EMPLOYER:	New Flyer Industries Limited
UNION:	Canadian Association of Industrial Mechanical, and Allied Workers, Local No. 3
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	J. Youngman/T.G. Parkinson, for the Employer S. Spratt, for the Union
ISSUES:	1. Discipline: Grounds for Discipline: Innocent Absenteeism 7:3210 2. Inability to Discharge Employment Obligations 7:3220 3. Compensation: Proof of Recovery 8:3342
DECISION RENDERED:	August 4, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor had worked for the Employer for 14 years, and was discharged because of a poor attendance record. The reason for the Grievor's absence was given as ill health. He had a knee injury, which initially occurred prior to his commencing employment with the Employer in 1973. As a result of the injury, which appeared to have been aggravated at the workplace, the Grievor spent extended periods of time on Workers Compensation and in seeking medical care.

The Employer claimed that the Grievor could not reasonably comply with its requirements and that it (the Employer) was put in an awkward position, because workloads could not be planned accordingly. In the view of the Union, the Grievor should not have been penalized for innocent absenteeism, especially in view of his record of being a 14-year employee. The Employer, the Union claimed, was aware of the Grievor's restrictions and the latter was entitled to work within those restrictions.

AWARD: The grievance was denied. The Arbitrator was satisfied that there was undue absenteeism in the Grievor's past record. The Arbitrator felt that the onus was then on the Grievor to establish that he would be capable of regular attendance in the future. After such consideration, the Arbitrator was not satisfied that the Grievor had met that onus.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-08-002

EMPLOYER: New Flyer Industries Limited

UNION: Canadian Association of Industrial Mechanical, and Allied Workers, Local No. 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: J. Youngman/G.D. Parkinson, for the Employer
S. Spratt/P.J. McEvoy, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Limits to the Arbitration of Grievances: Arbitrability: Time Limits 2:3128
2. Delay 2:3210
3. Seniority: Application of Seniority: Bumping 6:2330
4. The Skills & Ability Requirement: Senior Employee With Required Ability 6:3210
5. Examinations & Tests 6:3340

DECISION RENDERED: August 5, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Following a reduction of production at the Employer's plant, the Grievor was laid off. He grieved that he had been unjustly laid off, while junior workers were retained on work he was capable of doing.

At the commencement of the hearing, the Union advised that the grievance should have been allowed, because the Employer had not responded to same. The argument was raised that the latter had violated the time limit provisions of the collective agreement. The Union's submission at that point was with respect to a test taken by the Grievor to show his ability as a Production Worker, the position into which he sought to bump. The dispute arose at the time when the present Employer was in the process of assuming ownership of the company from the Province of Manitoba. At that time, extensive negotiations ensued regarding various aspects of the operation of the company. In response to the Union's submission that the Employer had violated the time limit provisions, the latter noted that under subsection 109(2) of **The Labour Relations Act** an arbitrator was given discretion to extend time limits. Further, it (the Employer) argued that no one was prejudiced by the delay.

After receiving the evidence, the Arbitrator was satisfied that due to a number of unusual circumstances in the case he should hear the matter on the merits.

When the hearing recommenced, evidence was presented with respect to the test the Grievor had taken. The Grievor had been a Warehouseman, and had been tested for a Production Worker so that he could exercise his bumping rights. He felt that he had passed the test, and waited for the Employer to advise him on when to return to work. When he was not contacted, the Grievor contacted the Employer, and was told not to return to work as he had failed the test. According to the Employer, the completed job was of satisfactory quality. However, the Grievor did not know how to read blue prints and took an unusually long time to complete the assignment.

AWARD: The grievance was allowed. The Arbitrator was satisfied, from a preponderance of the evidence, that the Grievor did not fail the test; the ultimate test had to be the finished product. In this case, the finished product was accepted by Quality Control. The Arbitrator recognized that the Grievor did not have the satisfactory blue print reading skills, but did demonstrate satisfactory standards in assembly and tool usage. Thus, the Grievor had demonstrated to a reasonable standard his ability to work as a Production Worker.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration** (2nd ed.) pp. 312 & 313; and Palmer, **Collective Agreement Arbitration in Canada**, (2nd ed.) pp. 195-202, 532-535.

FILE NO. AA87-08-003

EMPLOYER:	INCO Ltd.
UNION:	United Steelworkers of America, Local 6166
ARBITRATOR:	P. Phillips
APPEARANCES:	J.M. Christianson, et al, for the Employer R. Mayer, for the Union
ISSUES:	1. Discipline: Warnings: Discharge 7:3542 2. Refusal to Follow Instructions 7:3610 3. The Doctrine of the Culminating Incident 7:4310 4. The Reasonableness of the Penalty 7:4300
DECISION RENDERED:	August 7, 1987 (Final Decision for Interim Award of July 10, 1987)
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor was discharged for an alleged breach of the Employer's safety regulations with respect to the use of the proper hooks for the moving of anodes. Immediately prior to his discharge, he was in step 2 of the A.W.O.L. disciplinary program and in step 4 of the misconduct disciplinary program.

The Employer's position was that it had followed all the recognized provisions of the discipline procedure; that the new safety procedures on the use of the proper hooks had been well established and enforced without discrimination; and that the Grievor's failure to heed the safety procedure was merely one further indication to his previous disciplinary record that he was unwilling to abide by the working and safety rules and procedures prescribed by the Employer.

The Grievor did not question the disciplinary procedure taken by the Employer, but questioned the appropriateness of the penalty.

AWARD: The greivance was denied. The Arbitrator was satisfied that the Employer had made every reasonable effort to communicate its revised safety regulations regarding the use of anode hooks, and that the regulation had been communicated to the Grievor and other employees. As well, the Arbitrator viewed the deliberate abuse of the rules, particularly in the light of a concerted effort by the Employer to improve on safety, must be considered a major disciplinary offence. This was so in light of the Employer's history of accidents and injury. The Arbitrator was satisfied that the seriousness of the offence was sufficient to constitute a "culminating incident." Finally, the Arbitrator noted that the Grievor made no effort to prove the existence of any mitigating factors other than the argument that given the unemployment situation, dismissal would represent a heavy economic hardship for any worker. The Arbitrator noted that suspension was not included as an intermediary penalty between a reprimand and dismissal. It was his belief that he did not have jurisdiction to introduce such an intervening level of discipline.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration,** (2nd ed.) pp. 483-484.

FILE NO. AA87-08-004

EMPLOYER: The City of Thompson

UNION: United Steelworkers of America, Locals 8223 & 7911

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: E. McCormick, for the Employer
R. Playter, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Policy Grievances 2:3124
2. The Arbitration Process: Admissibility of Evidence: Extrinsic Evidence 3:4400
3. Negotiating History 3:4420
4. The Collective Agreement: Object of Construction: Intention of the Parties 4:2100

DECISION RENDERED: August 10, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union brought forth a policy grievance alleging that members were not allowed to use half-day's sick leave to make up full pay when on sickness and accidents.

A Memorandum of Agreement was signed between the parties subsequent to a strike. Provisions were made in the Memorandum for, among other things, sick leave. Proposed changes in the sick leave provisions had been a significant issue in the negotiations and in the ensuing strike. The issue of construction arose with respect to the Memorandum. The Union took the position that articles 19:06 and 22:06 in the prior agreements, identical for both Locals, were unaccepted by the Memorandum and were intended to carry forward with full force and effect into subsequent collective agreements. Articles 19:06 and 22:06 stated, in part, that:

> An Employee who has accrued sick leave to his credit may use this credit to entitle him to full pay when on Sickness and Accident coverage . . .

According to the Memorandum, sick leave accrual was eliminated and could not be used to "top up" weekly indemnity. Instead, each employee was credited with 12 days of sick leave at the beginning of the year and weekly indemnity benefit was increased commencing on the fifth day, instead of the 15th day. The Employer's position was that the provisions of articles 19:06 and 22:06 had been supplanted and replaced by the provisions in the Memorandum.

AWARD: The grievance was denied. The Arbitrator noted that the whole of the agreement between the parties was not reflected in the Memorandum, but that the latter would govern where inconsistencies between the two arose. He was satisfied that an "ambiguity" existed which permitted him to have regard to extrinsic evidence as an aid to the interpretation of the parties.

On considering the history of negotiations between the parties, the Arbitrator was satisfied that article 19:06 was not intended by the parties, either expressly for the language of the Memorandum or implied, to be interpreted as part of the agreement reached between the parties. Article 19:06 was, according to the Arbitrator, negotiated away during the tough bargaining which concluded after the strike.

AUTHORITIES: None cited.

FILE NO. AA87-08-005

EMPLOYER: Central Manitoba Publishing Co. Ltd. (The Winnipeg Sun)

UNION: Media Union of Manitoba, No. M-38

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: G.D. Sigurdson, Q.C./J. Palamar, for the Employer
R. Tonn, for the Union

ISSUES: 1. Discipline: Grounds for Discipline: Refusal to Follow Instructions 7:3610
2. Onus 7:3250

DECISION RENDERED: August 13, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Following reconsideration of its decision to discharge the Grievor, the Employer reinstated the former with the penalty of a seven-week suspension. The grievance in this matter, by agreement, was that the Grievor had been suspended without just cause. The parties further agreed, among other things, that the onus was on the Employer to establish just cause for the suspension.

It was alleged that the Grievor was requested by the supervisor to assist another worker in doing a particular chore, and the Grievor refused to obey the instruction. The Grievor had rested her head on the table in the coffee shop as she was tired or hung over. She claimed that she never spoke to, or was spoken to, by the supervisor at the time which the latter claimed that he had issued the instruction to the Grievor. When the supervisor spoke to her, the Grievor claimed he told her to go home if she was tired.

AWARD: The grievance was allowed. The Arbitrator was satisfied that the Employer did not discharge the onus on it of establishing that it had just cause for the discipline. He found that the supervisor may not have uttered the words that he did in the way and in the manner in which he testified. Thus, the Arbitrator accepted the testimony of the Grievor.

AUTHORITIES: **Re Canadian Lukens Limited and United Steelworkers of America**, 12 L.A.C. (2d) 439 at 441.

FILE NO. AA87-08-006

EMPLOYER: Genstar Cement Ltd.

UNION: The United Cement, Lime, Gypsum & Allied Workers International Union, Local 505

BOARD: M.H. Freedman, Q.C., Chairperson
H. Piercy, Nominee for the Employer
H. Matthews, Nominee for the Union

APPEARANCES: W. Ritchie, Q.C./K. McLean, for the Employer
R. Tonn, for the Union

ISSUES
1. Seniority: Senior Employee With Required Ability 6:3210
2. Bumping 6:2330
3. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100

DECISION RENDERED: August 13, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor worked as a Washmill Operator, and was bumped from his position by a more senior employee. As a result of being laid off, the Grievor sought to bump into the Repairman I position held by a less senior employee. The bump into the Repairman I position was denied by the Employer. The Grievor grieved the denial of the bump, and claimed that he had every right to exercise his bump as allowed by contract.

The Union agreed that the Grievor had the ability to perform the work of a Repairman I, because he had, in fact, performed it satisfactorily on many prior occasions. The Employer's position was that the Repairman I position required a journeyman's status as per the Employer's policy.

It was agreed that if the test governing the Grievor's bump was set out in article VIII, section 3, of the collective agreement then the grievance would succeed. Likewise, it was agreed that if the test governing the Grievor's bump was set out in section 8 then the grievance would fail because the Grievor was not a certified tradesman. Section 3 stated, in part, that:

> In all cases of promotion to a higher paid classification in the bargaining unit filling of vacancies or newly created jobs, reduction of work forces and recall after lay-off the following factors will be considered by the parties:
>
> (a) seniority,
> (b) ability to perform the work . . .

Section 8, entitled, "Posting for a Permanent Vacancy", described procedures for filling permanent positions. For specific positions, including Repairman I, it was stated that the employee's qualification was to be the "prime factor" for selection. Under this section, the Employer argued that a temporary bump would allow the Grievor to hold the position for the entire winter, so that essentially that was a form of promotion through bumping even though the Grievor could not ultimately hold the position on a permanent basis. Thus, it was not a reasonable construction of the agreement that the Grievor obtain a position through bumping that he could not obtain through the normal promotion process.

AWARD: The grievance was allowed. According to the Board, clearly, the Grievor was capable of performing the job, and in every respect would have been eligible for it except that he did not have the trade qualification. The Board held that if the Grievor was temporarily eligible for the job at the Employer's direction, he would not be ineligible for it on a bumping basis simply because he could not be promoted to the job permanently. A majority the Board held that since the issue dealt with a on temporary situation then section 3 and not section 8 applied.

DISSENT: H. Piercy, Nominee for the Employer. Mr. Piercy's view was that, in the matter in question, by the operation of section 3 the Grievor presumably would be able to effectively obtain the Repairman I position, where if he had applied for the position as a permanent position his application would fail because he was not qualified. It was his opinion that the interpretation placed on the agreement, in the circumstances of the case, gave rise to an anomaly, and, so, he would have dismissed the grievance.

AUTHORITIES: None cited.

FILE NO. AA87-08-007

EMPLOYER:	The Age and Opportunity Centre, Inc.
UNION:	The Canadian Union of Public Employees, Local 2140
BOARD:	D.E. Bowman, Q.C., Chairperson R. Whiteway, Nominee for the Employer C. Trigwell, Nominee for the Union
APPEARANCES:	A.R. McGregor, Q.C., for the Employer R. Tonn, for the Union
ISSUES	1. Organization & Direction of the Workplace: Assignment of Bargaining Unit Work to Non-Employees: Contracting Out 5:1300 2. The Collective Agreement: Management Rights 4:2310 3. Employee Defined 5:1122 4. The Arbitration Process: Weighing the Evidence 3:5100
DECISION RENDERED:	August 21, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: As part of its services to the elderly, the Employer ran educational programs for seniors. Among persons providing instructions for such programs were contract instructors hired by the Employer. They fell under schedule 8 of the collective agreement entitled, Term Employees, and among the various incidents attached to these contract employees was the deducting of Union dues from their salaries and the remissions of such dues to the Union.

The Employer entered into a form of "Independent Contract Agreement" with the former contract employees, most of whom were the same persons who had served as contract instructors under the earlier practice. Whereas formerly, the particular employees had been paid an hourly rate, they were paid a lump sum for their services over a given period of time.

The Union alleged that the Employer had violated clause 3:02 (and other clauses) of the agreement by contracting out the teaching of education courses. Clause 3:02 stated, in part, that:

> . . . It is understood that the Employer will, from time to time, employ contract employees who will benefit from and be bound by all aspects of the collective agreement except salaries . . .

The Union's position was twofold. The first was that under the terms of the collective agreement the Employer was prohibited from contracting out work done by persons who fell within the bargaining unit. The second was that even if the agreement permitted such contracting out the procedure followed did not effectively turn the former employees into "independent contractors" but that they remained employees, and among other things, remained subject to deductions for Union dues.

The Employer argued that in order to prohibit contracting out very precise words were required in the agreement. It urged that the agreement fell short of any such absolute provision.

AWARD: The grievance was allowed. Regarding the first of the Union's positions, the Board noted that the wording of article 3:02 demonstrated the intention of the parties to permit the employment of persons who were in effect outside the bargaining unit, but who, for those purposes, would be bound by the agreement. If the agreement had provided for a total ban on contracting out, it would not have been necessary to so categorize the particular instructors who would of necessity have to be or become members of the unit. Thus, contracting out was not prohibited by the terms of the agreement.

Regarding the second of the Union's positions, namely, that what was done did not amount to a valid and effective contracting out, the Board noted many tests have been used to distinguish between an "independent contractor" and an employee. In this case, the fourfold test: of control, ownership of tools, chance of profit, and risk of loss were adopted. The critical element in this matter, according to the Board, was the element of control, control being often equated with the question of who pays the person. The Board noted in this instant that, among other things, the work was being done by the same persons as before; payment was being made from the same source as previously; and the earnings of those concerned were only very slightly different. Thus, nothing had really changed except a name. The instructors in question had remained contract employees within article 3:02 of the agreement.

As a result, given the findings of the Board, the Employer was ordered to cease from dealing with those persons under the guise of "independent contractors" and to remit to the Union all dues payable by the instructors which were unpaid during the existence of the "Independent Contract Agreement".

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-08-008

EMPLOYER: The Manitoba Telephone System

UNION: Communications Workers of Canada (Clerical Employees), Local 7

BOARD: P.S. Teskey, Chairperson
G.D. Parkinson, Nominee for the Employer
H. Matthews, Nominee for the Union

APPEARANCES: E.W. Olson, Q.C./V. Rachlis, for the Employer
G. Mendelson, for the Union

ISSUES:
1. The Collective Agreement: Management Rights 4:2310
2. Management's Duty to Act Fairly 4:2320
3. Organization & Direction of the Workplace: Job Posting 5:2520
4. Seniority: Education & Experience 6:3320

DECISION RENDERED: August 25, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was hired as a "term employee" for what was referred to as the "Winnipeg Campaign". Her employment was scheduled to end on or about March 1, 1985. After completing the "Winnipeg Campaign", she was re-hired again as a term employee for the "Provincial Campaign" until September 15, 1985. In August of 1985, the Grievor applied for three vacant positions for the upcoming "Winnipeg Campaign" for 1985/86. She was not granted an interview for any of the positions based on the Employer's insistence that she was not qualified for same. The Employer proceeded to fill the vacancies by individuals from outside the bargaining unit. Likewise, the Grievor was informed in August 1985 that her employment would be terminated on September 6, 1985, and not September 15, 1985, as previously arranged.

The grievances brought forth were the lack of being granted an interview and, "just consideration in regard to obtaining the position." The policy grievance requested that the Grievor be permitted an interview on a specified job posting. The other issue raised by the original policy grievance was that a term employee had been discriminated against as a result of filing a grievance on an unjust suspension.

Before the hearing commenced, the Union sought to amend the grievance requesting a declaration that the Employer had misrepresented, and/or misapplied, and/or violated the collective agreement by denying the Grievor an interview and by not selecting her for any of the three positions in the said posting. The Union sought as a remedy the appointment of the Grievor to one of the positions and payment of full compensation to her.

AWARD: The grievance was allowed. The Board was satisfied that the evidence before it was not sufficient to establish whether the early terminations had been a kind of retributive action in response to the Grievor's filing a grievance for being given a one-day suspension. However, the Board found that the decision to terminate early neither was required nor reasonable. As a remedy, the Board ordered that the Grievor be recompensed for any lost earnings and be credited for any lost seniority until September 15, 1985.

Regarding the failure on the part of the Employer to interview the Grievor, the Board found that the method for shortlisting the applicants under article 14 of the agreement was neither fair nor appropriate in the Grievor's circumstances. There was no rational basis for making comparisons among the Grievor and other candidates and then utilizing those comparisons as a basis for denial of an interview. As a remedy, the Board ordered that the Grievor be interviewed for the first vacant position, given the new "Winnipeg Campaign" was scheduled to commence shortly. The Grievor, if she was found to have had all requirements, was to be placed in the position without the necessity of further competition. No compensation was awarded.

DISSENT: G.D. Parkinson, Nominee for the Employer (dissention not attached), and H. Matthews, Nominee for the Union (dissention not attached), did not concur in part.

AUTHORITIES: None cited.

FILE NO. AA87-09-001

EMPLOYER:	The City of Winnipeg
UNION:	Canadian Union of Public Employees, Local 500
BOARD:	J.M. Chapman, Q.C., Chairperson G.T. Haig, Q.C., Nominee for the Employer J. Collins, Nominee for the Union
APPEARANCES:	M. Samphir, Q.C./M.E. Cavett, for the Employer M. Myers, Q.C., for the Union
ISSUES:	1. Seniority: Disciplinary Record 6:3310 2. Ability & Qualifications Criteria 6:3300 3. Aptitude 6:3330
DECISION RENDERED:	September 9, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor entered the Civic Service in November 1981. At the time when the grievance was filed, he was employed as a Clerk "A" in the Assessment Department. He applied for one of 25 positions for an Assessor I, and was advised that his application was not accepted. The Grievor believed that he should have been awarded the position because of his seniority and qualifications.

The Employer argued that under article 12.6 of the collective agreement the department head was not obligated to fill the position by seniority if the senior applicant was not deemed to be suitable for the vacant position. The Grievor, who had a criminal record, was deemed to be an unsuitable candidate.

The Union filed a grievance alleging that the Employer violated article 12 of the collective agreement and subsection 69.2(2) of **The Labour Relations Act**. Because the Employer had no specific policy with respect to a criminal record being a disqualification for employment and had not previously used it as a criteria for employment, the Employer discriminated against the Grievor and was not acting reasonably, fairly, or in good faith.

AWARD: The grievance was disallowed. The Board was satisfied from the evidence presented that the Employer did not act discriminatorily or in bad faith and complied with the collective agreement. In addition, the Board did not feel that a formal policy must exist as to whether or not queries regarding a criminal record can be made. However, an individual should not be penalized forever, and should be given the opportunity to prove trustworthiness.

DISSENT: J. Collins, Nominee for the Union. Mr. Collins stated that the question of having a criminal record was not a factor in the hiring of any assessors prior to this incident. Therefore, the use of a new and unprecedented factor was discriminatory. As well, the Employer admitted that the absence of a pardon was a major factor in denying the promotion. However, the Arbitration Board deemed the pardon irrelevant. Therefore, the Employer violated **The Labour Relations Act** by introducing an irrelevant factor. Thus, the grievance should have been upheld.

AUTHORITIES: **City of Winnipeg and Canadian Union of Public Employees, Local 500**, M.L.B. Compendium of Grievance Arbitration Decisions 1985, p. 31; and others.

FILE NO. AA87-09-002

EMPLOYER: The Province of Manitoba

UNION: The Manitoba Government Employees Association

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: C. Hill/J. Nichol, for the Employer
R. Cannon/R. Olien, for the Union

ISSUES:
1. Compensation: Bereavement Leave: Purpose & Entitlement 8:3510
2. Collective Agreement: Object of Construction: Intention of Parties 4:2100

DECISION RENDERED: September 10, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, an employee of the Department of Community Services in Portage la Prairie, was absent from work for one day so that she could transport her husband to and from Winnipeg where he underwent oral surgery. He could not travel unaccompanied, taking the bus was not appropriate, and the Grievor was the only one available to drive him. She applied for compassionate leave under article 28.06 of the collective agreement. Her request was denied.

The Employer interpreted article 28.06 to provide for leave with pay only when there is a "dangerous illness." The Employer did not view oral surgery as a dangerous illness.

The Union differed in its interpretation of article 28.06, stating that the wording, "For other purposes, such as a dangerous illness . . .", allows for a variety of circumstances. The Union filed a grievance on this basis.

AWARD: The grievance was allowed. The Arbitrator agreed with the Union's interpretation of article 28.06. The use of the plural form of "purpose" and the inclusion of "such as" indicates that a dangerous illness is only an example. The Arbitrator made reference to a previous award which involved the interpretation of substantially the same provision. His decision did not follow the previous award because he was of, "the clear conviction however that the interpretation of the Agreement in that award is wrong."

AUTHORITIES: **The Manitoba Government Employees Association and The Province of Manitoba**, July 9, 1985 (unreported); and **Brewer's Warehousing Co. Ltd. (1954)**, 5 L.A.C. 1797 at p. 1798 (Laskin).

FILE NO. AA87-09-003

EMPLOYER: The Deer Lodge Centre Inc.

UNION: The Public Service Alliance of Canada

BOARD: P.S. Teskey, Chairperson
R. Whiteway, Nominee for the Employer
J.A. McNevin, Nominee for the Union

APPEARANCES: D. West/S. Seabourne, for the Employer
G. Maruca/B. Shaw, for the Union

ISSUES
1. Jurisdiction of the Arbitrator: Policy Grievance 2:3124
2. Seniority: Promotion, Demotion & Transfer 6:2100
3. Organization & Direction of the Workplace: Requirement of Bona Fides 5:2300

DECISION RENDERED: September 14, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer employed seven full-time and one part-time Medical Technologist I's in the Department of Laboratory Services. Due to a decrease in the workload, the four least senior employees were informed that they would be redeployed to other departments.

Although the new positions were covered under the same collective agreement, they were part of a different bargaining unit. While one employee was able to secure an acceptable permanent position, the other three were assigned to positions of lower classification. However, they did not incur a loss in salary or a decrease in their normal working hours.

The Union filed three individual grievances and a policy grievance. All four grievances alleged that the Employer violated Article 30:05 of the collective agreement, which stated that an employee would not be transferred to a position outside the bargaining unit without his consent.

AWARD: The grievances were denied. The Board determined that the Grievors were redeployed rather than transferred because their salaries and normal work hours were retained. As well, the Employer confirmed that the Grievors would be returned to their former positions if any vacancies arose. Therefore, the Employer acted reasonably and did not violate article 30:05.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration,** (2nd ed.) pp. 152-155.

FILE NO. AA87-10-001

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: A. Buhr, et al, for the Employer
R. Tonn, et al, for the Union

ISSUES
1. Seniority: Senior Employee with the Required Ability 6:3210
2 Discipline: Innocent Absenteeism 7:3210
3. Remedial Authority of the Arbitrator: Promotions 6:4100

DECISION RENDERED: October 6, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was a temporary Refuse Helper and also held positions of Spare Equipment Operator II and III. The Grievor applied unsuccessfully for an appointment to the Spare Weighmaster List. Seven people were appointed. The last successful applicant on the list had less seniority than the Grievor.

The Employer doubted the reliability of the Grievor due to what was determined as an excessive use of sick time over the two-year period prior to his application. The Employer viewed reliability as an important and necessary qualification for the post of Weighmaster.

The Union argued that reliability was only one factor, and not a major one, for the role of Weighmaster. In addition, the Grievor met the qualifications for the appointment and due to his senioirity was entitled to a posting. As well, the Grievor, who never exceeded the sick time allowed under the collective agreement, had never been disciplined for his absenteeism.

AWARD: The grievance was allowed, and the Grievor was to be placed on the list ahead of the last applicant. The Arbitrator concurred with the Union that reliability in terms of attendance was not a reasonable qualification in this case. More specifically, the Arbitrator concluded that because the Grievor used less than the allowed time, was never disciplined for absenteeism, and explained that he expected the working conditions of the new position would reduce his absences, he should not be deprived of the new position to which his seniority entitled him.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-10-002

EMPLOYER: The City of Winnipeg

UNION: The Winnipeg Association of Public Service Officers

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir/M. Cavett, for the Employer
D. Newman, for the Union

ISSUES
1. Compensation: Entitlement to Wages 8:1000
2 Compensation: Overtime Work 8:2130
3. The Arbitration Process: Onus or Burden of Proof 3:2400

DECISION RENDERED: October 7, 1987
(Interim Award - September 19, 1986)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: An interim award was issued for this case in September 1986. The Employer had raised a preliminary objection as to the Arbitrator's jurisdiction to deal with the grievance. The Arbitrator held that he had jurisdiction to deal with the claim from the time the Grievor joined the Union in 1980.

The matter before the Arbitrator at this hearing was the Grievor's claim that he was under-compensated for the overtime he had worked. The Employer admitted that the job required working irregular hours, but disputed the necessity to work the excessive hours claimed by the Grievor. On many occasions, the Employer told the Grievor that he was responsible to manage his own time.

AWARD: The grievance was denied. The Arbitrator found that the overtime worked was not required by the Employer or by the reasonable needs of the job. A substantial portion of the tasks could have been delegated, deferred, or not performed at all. The Arbitrator felt that the Grievor's case was weakened by his lack of diligence in filing the grievance.

AUTHORITIES: None cited.

FILE NO. AA87-10-003

EMPLOYER:	Lucerne Foods Ltd., Cheese and Butter Department
UNION:	Retail, Wholesale and Department Store Union, Local 468
BOARD:	P.S. Teskey, Chairperson H.B. Monk, Q.C., Nominee for the Employer P. Moist, Nominee for the Union
APPEARANCES:	R.J. Hansell, Q.C., for the Employer R. Tonn, for the Union
ISSUES:	1. Seniority: Proof of Ability 6:3200 2 Senior Employee if Relatively Equal 6:3220 3. Seniority: Ability and Qualifications Criteria 6:3300 4. Seniority: Remedial Authority of the Arbitrator 6:4000
DECISION RENDERED:	October 13, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Employer posted the position of Maintenance Mechanic. After interviewing the applicants, the Employer determined that none were qualified. Subsequently, the Employer and Union agreed to amend the posting to provide for two Assistant Maintenance Mechanics. The original applicants would be considered for the posting. After six months, one of the two successful candidates would be appointed Maintenance Mechanic. One position was awarded to the incumbent Assistant Maintenance Mechanic, who was later promoted to Maintenance Mechanic. The other position was awarded to the most junior of the applicants. The Grievor, who was the most senior of the applicants, contested the latter appointment.

The Union filed a grievance alleging that the Employer violated article 8.05.1 of the collective agreement, which states that positions are filled "by seniority, merit and ability being relatively equal." In terms of education and skills, the Grievor and the successful candidate were relatively equal in qualifications. With respect to potential, the Employer was making a subjective decision, and the successful candidate was untried and unproven.

The Employer argued that although the Grievor had been employed in the Maintenance Department, his previous job experience was irrelevant because the volume and complexity of the job changed since he had held the position. In addition, the successful candidate displayed a superior ability to work with people.

AWARD: The grievance was allowed. The Board agreed with the Union that an undue amount of weight was placed on a subjective measurement of potential. The Board ruled that the Union met the onus to prove that the Grievor was qualified. The Employer was ordered to award the Grievor the Assistant Maintenance Mechanic position with compensation paid retroactive to the date of filling. The voidance of the appointment of the Maintenance Mechanic was not within the Board's jurisdiction.

DISSENT: H.B. Monk, Nominee for the Employer. Having found that neither the Grievor nor the successful applicant was fully qualified for the position, the Employer was free to select the person of its choice. Therefore, Mr. Monk would have disallowed the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-10-004

EMPLOYER: The Winnipeg Art Gallery

UNION: The Manitoba Government Employees' Association

ARBITRATOR: P.S. Teskey

APPEARANCES: S. Green, Q.C., for the Employer
B. Havelock, for the Union

ISSUES:
1. Limit to the Arbitration of Grievances: Arbitrability: Collective Agreement Limitations 2:3100
2 The Arbitration Process: Preliminary Objections 3:2100
3. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
4. Discipline: The Nature of Disciplinary Sanctions 7:4210

DECISION RENDERED: October 14, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor received a letter of reprimand from the Employer and was informed that a copy would be placed in her personnel file. The Grievor requested that the letter be rescinded and removed from her file; that the allegations in the letter never be repeated in verbal or written form to any party; and that a written letter of commendation be provided. Her request was denied. The Union filed a grievance under expedited arbitration claiming that the Grievor was being disciplined without just cause.

Prior to the hearing, the Employer raised an objection as to the jurisdiction of the Arbitrator and the arbitrability of the grievance. The Employer felt the reprimand was justified and had invited the Grievor to append her written comments to the letter in accordance with article 3:01 of the collective agreement. The Grievor's last two requests were not viewed as grievable. The

Employer submitted that the right provided under article 13:03 in the collective agreement, which allowed the employee to file a written reply, qualifies or restricts any rights to grieve under article 13:01. The intention of the parties was that minor forms of discipline would not be grievable. The matter would become grievable if the Employer relied upon the letter of warning in future actions against the Grievor.

The Union argued that the Employer's narrow interpretation disregarded the basic purpose of the grievance procedure. Because the letter was disciplinary in nature and the discipline was unjust, the matter was grievable.

AWARD: The Arbitrator found the third request beyond its jurisdiction and the second to be redundant with respect to the first. Therefore, the real issue was whether or not the letter was disciplinary and if it should be rescinded. The grievance was denied. The Arbitrator found the letter to be disciplinary, however, the collective agreement was susceptible to interpretation. Although he had difficulty accepting the dual rights, he ruled that article 13:03 indicated that the parties intended lesser forms of discipline to be treated differently from the more serious penalties of suspension or discharge.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, 2nd ed. at pp. 468-469; **Re Notre Dame Integrated School Board and Newfoundland Teachers' Association** (1978), 22 L.A.C. (2d) 286 (Harris); and others.

FILE NO. AA87-10-005

EMPLOYER: The Province of Manitoba, Department of Health

UNION: The Manitoba Government Employees' Association

ARBITRATOR: G. Reid

APPEARANCES: R.D. Cram, for the Employer
G. Rodgers, for the Union

ISSUES:
1. Remedial Authority of the Arbitrator: Unjust Discharge or Suspension 2:1421
2 Insubordination: Essential Ingredients 7:3612
3. Insubordination: Insolent, Unco-operative Behaviour, Obscene Language 7:3660
4. Disciplinary Penalties: The Reasonableness of the Penalty 7:4300

DECISION RENDERED: October 19, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor drafted a memo to the Assistant Deputy Minister in response to a complaint filed against her by a fellow employee. The text of the memo was considered to be gross insubordination. As a result, the Grievor, who had been disciplined on prior occasions, was suspended for two days without pay. Subsequently, the Union filed a grievance claiming that the Grievor was unjustly and unfairly suspended.

AWARD: The grievance was allowed in part. The Arbitrator ruled that the actions of the Grievor were a very minor form of insubordination because she did not refuse to carry out any orders issued by her superior and the language in the memo was not harsh. Thus, the suspension was found to be excessive. The Employer was ordered to remove the record of the suspension from the Grievor's file. In addition, the Grievor was to be reimbursed for monies, benefits, or any seniority lost as a consequence of the suspension.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, 1977, p. 359; Sack & Poskanzer, **Labour Law Terms: A Dictionary of Canadian Labour**, 1984, p. 81; and **Black's Law Dictionary**, p. 942.

FILE NO. AA87-10-006

EMPLOYER: Manitoba Telephone System

UNION: International Brotherhood of Electrical Workers, Local 435

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: E.W. Olson, Q.C./J. McGuire, for the Employer
P. Teskey/M. Harper, for the Union

ISSUES:
1. Discipline: Untrustworthiness and Conflict of Interest 7:3330
2 Discipline: Mitigating Factors 7:4400
3. Discipline: Employee's State of Mind 7:4424
4. Discipline: Economic Hardship 7:4426

DECISION RENDERED: October 22, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as an equipment installer. He obtained a customer's name and phone number on false pretenses from a sales representative. He then phoned her on a number of occasions. The woman, from encouragement of the police, made arrangements to meet the Grievor. At the meeting the police apprehended him but did not press charges. When the Employer was informed of the incident, the Grievor was suspended and subsequently discharged.

The Union did not dispute the serious nature of the Grievor's actions. However, the Union filed a grievance which claimed the discharge was unjust. Evidence was presented illustrating how the Grievor's state of mind had contributed to his behaviour. If the discharge was allowed, the Grievor would suffer economic hardship.

The Employer was firm in its position. The grievor had breached the Company's code of ethics and had violated the customer's confidence. The Employer could not risk damaging that trust.

AWARD: The grievance was denied. Although the Arbitrator sympathized with the personal circumstances of the Grievor, he could not force the Employer to accept the risk that the incident would be repeated. A recurrence could irreparably damage the customer's trust of the Company.

AUTHORITIES: Palmer, **Collective Agreement Arbitration in Canada**, at p. 229 and 231; Brown & Beatty, **Canadian Labour Arbitration**, 2 ed. at p. 483; **Re Bell Canada and Communications Union Canada**, 22 L.A.C., 2nd at 6; and others.

FILE NO. AA87-10-007

EMPLOYER: Royal Canadian Legion, Branch No. 97

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 1

ARBITRATOR: P. Teskey

APPEARANCES: D. Proctor, for the Employer
S. Spratt/C. Cassista, for the Union

ISSUES: 1. Organization and Direction of the Workplace: Scheduling Work: Work Hours and Shifts 5:3100
2 The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: October 22, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was employed as a part-time waitress. She complained that on two occasions a bartender was given hours to accomodate him for the cancellation of his regular shift. On a third occasion, a waitress/bartender was offered hours when another waitress/bartender called in sick. Both employees were senior to the Grievor. She accepted that senior staff do receive more hours. However, she stated that "past practice" had always been to divide hours equally. As a result, the Union filed three individual grievances for expedited arbitration. The Union alleged that the Employer violated subsection 69.2(2) of **The Labour Relations Act** because it acted unfairly or unreasonably in the allocation of hours.

The Employer indicated that the matters grieved were not arbitrable because article 6.06 of the collective agreement provides for the scheduling of employees in their category according to seniority. **The Labour Relations Act** was not violated as the collective agreement was not breached.

AWARD: The grievance was denied. The Arbitrator could not find sufficient basis for use of past practice. As well, the Arbitrator was of the opinion the Employer acted fairly and reasonably from the facts presented as per subsection 109(1) of **The Labour Relations Act.**

AUTHORITIES: None cited.

FILE NO. AA87-10-008

EMPLOYER:	The City of Winnipeg
UNION:	The International Association of Machinists and Aerospace Workers, Local 2589
BOARD:	J.M. Chapman, Q.C., Chairperson G.D. Parkinson, Nominee for the Employer M. MacIssac, Nominee for the Union
APPEARANCES:	M. Samphir/B. Sawicki, for the Employer L. Paulson, for the Union
ISSUES:	1. Arbitration of Grievances: (Interest Arbitration) 1:0000 2. Jurisdiction of the Arbitrator: The Collective Agreement 2:1200
DECISION RENDERED:	October 23, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The collective agreement between the parties expired December 31, 1985. The negotiations to finalize a new agreement broke down. In lieu of a proposed strike action, the parties agreed that the outstanding issues would be referred to binding arbitration.

The Union presented proposals on the following: wage parity with first constables on the police force; increasing the shift premium for evening, night, and weekend shifts; maintaining an employee on full salary during absence due to work related illness or injury; permitting the carrying forward of annual leave (During the course of the hearings, the parties reached an agreement on this issue.); and providing snowmobile pants to all members.

The Union also requested an interim award of a salary increase to all members. The Employer opposed the request. The following proposals were presented by the Emloyer: amending the grievance procedure to specify matters that were grievable; amending the grievance procedure so that a grievance would not succeed by default of time limits; deleting the provision which allowed for the removal of records of reprimand after six months; and reducing the minimum hours granted for jury duty or as a Crown witness.

AWARD: The Board decided not to approve the interim award. The Board ruled on the parties' requests as follows:

The granting of wage parity was denied. Historically, a reasonably consistent differential had existed between police constables, firefighters, and ambulance attendants. The attendants would have to be reclassified to equate their wages with the police and firefighters. The Board did not view this to be under their jurisdiction. The Board did grant a 3% wage increase for both 1986 and 1987. This increase is in line with those given to other bargaining units of the Employer.

The increase of shift premiums was allowed in part. The Board ruled against a premium for weekend shifts, but approved increases for the evening and night shift in 1986 and 1987.

The "top up" of Workers' Compensation was allowed. The Board found the request to be reasonable after considering other collective agreements and benefits which other bargaining units of the Employer receive.

The request for snowmobile pants was allowed in part. The Board recognized the need for the pants, but decided that the Employer should only have to maintain six pairs at each station.

The amendments to the grievance procedure were denied. The Board found no abuse of the grievance procedures in the past. As well, an arbitration board may grant relief against time limits.

The deletion of the provision was denied. However, the Board extended the time limit to twelve months to bring this provision in line with the removal of a record of suspension.

The reduction of the minimum hours granted was allowed. The Employer already compensates employees for attendance on a day off by paying the overtime rate. In addition, if an employee does spend more than the minimum of four hours, he would be compensated for those additional hours.

DISSENT: G.D. Parkinson, Nominee for the Employer. Mr. Parkinson did not agree with the majority with regards to the "salary continuance" to be given when an employee is receiving Workers' Compensation and the increase in shift premiums. He would have refused to top up an employee's salary, because this benefit would be in excess of those available in the private sector. As well, he would have awarded a two-stage shift premium to bring the compensation package in line with the percentage increase awarded in other agreements. Mr. Parkinson would have specified time limits for the grievance procedure and would have defined matters that could be grieved. Finally, he would have allowed the amendment to maintain records of reprimand, and would have clarified the rights available to either party in the case of reprimand.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-10-009

EMPLOYER:	Canada Safeway Limited
UNION:	Manitoba Food and Commercial Workers, Local 832
ARBITRATOR:	W.D. Hamilton
APPEARANCES:	R. Hansell, Q.C., for the Employer D. Primeau, for the Union
ISSUES:	1. Grounds for Discipline: Notification of Absence 7:3110 2. Disciplinary Penalties: The Reasonableness of the Penalty 7:4300 3. Disciplinary Penalties: Use of the Prior Record 7:4314 4. Disciplinary Penalties: Rehabilitative Potential 7:4422
DECISION RENDERED:	October 26, 1987
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor failed to report for his scheduled shift and did not notify his immediate supervisor of his absence. The Employer decided to discharge the Grievor due to this incident as well as the Grievor's prior record. The Union filed a grievance alleging that the discharge was unjust for two reasons. First, a shift schedule was not posted by the time specified in the collective agreement. Second, the Grievor had not been contacted by the Employer, as was his understanding, when hours were available. Even if the discipline was warranted, the Union argued that dismissal was too harsh as the punishment did not follow the principle of progressive discipline.

AWARD: The grievance was denied. From the testimony presented, the Arbitrator concluded that the schedule was posted, and accepted the Employer's evidence that a special arrangement had not been made with the Grievor. These findings led to the conclusion that disciplinary actions were justified. The Arbitrator did not alter the punishment in view of the Grievor's past disciplinary record and the importance of an employee attending work as scheduled.

AUTHORITIES: **North York General Hospital** (1973) 5 L.A.C. (2d) 45 (Shime) at pp. 46-47.

FILE NO. AA87-10-010

EMPLOYER: Canada Safeway Limited

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: D.G. Baizley, Q.C.

APPEARANCES: R.J. Hansell, for the Employer
D.A. Primeau, for the Union

ISSUES:
1. Grounds for Discipline: Penalty 7:3314
2. Disciplinary Penalties: The Reasonableness of the Penalty 7:4300
3. Disciplinary Penalties: Rehabilitative Potential 7:4422

DECISION RENDERED: October 27, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as a part-time night stockman. He was discharged due to his alleged failure to pay for food totalling $4.00, which he had consumed during his shift. At the time of the incident, he offered to pay for the goods and asked for another chance. However, at the hearing, the Grievor denied he took certain items and claimed he misread the price on another. He explained that he had confessed earlier because he had wanted to keep his job. The Union, which did not dispute the facts of the discharge, filed a grievance regarding the severity of the punishment.

AWARD: The grievance was allowed in part. The Arbitrator was satisfied from the evidence that theft had occurred. Although the charge was denied, the Arbitrator felt that the Grievor was capable of learning from the seriousness of his misconduct. As well, the Grievor had not been disciplined before. Therefore, the Arbitrator ordered the discharge to be revoked. Instead, the Grievor was to be suspended without pay until November 15, 1987.

AUTHORITIES: **Re Toronto East General Hoaspital Inc. v. Service Employees International Union** (1975) 9 L.A.C. (2d) pp. 311 & 324 (Beatty).

FILE NO. AA87-10-011

EMPLOYER: Canada Packers Inc.

UNION: United Food and Commercial Workers' International Union

BOARD: M.H. Freedman, Q.C., Chairperson
H. Piercy, Nominee for the Employer
T. Ulrich, Nominee for the Union

APPEARANCES: D. Newman, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Grounds for Discipline: Fighting, Assault 7:3430
2. The Doctrine of the Culminating Incident 7:4310
3. Disciplinary Penalties: Mitigating Factors 7:4400
4. Disciplinary Penalties: Provocation 7:4412

DECISION RENDERED: October 30, 1987
(Interim Award - January, 1987)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor had been employed in the hog killing area of the plant for three years. He was discharged for fighting with a co-worker. The Grievor claimed that his co-worker provoked him with abusive comments. The Union filed a grievance alleging that the dismissal was too harsh. The Grievor's past disciplinary record did not involve any fighting incidents and he was provoked in this case. Therefore, the incident only justified a suspension.

The Employer viewed the actions of the Grievor to warrant severe disciplinary action because he clearly violated a well known company policy regarding fighting. This incident alone would result in a suspension. However, when taken in combination with his poor attitude and poor disciplinary record, the culminating incident was not minor.

AWARD: The grievance was denied. The Board found that the Grievor clearly disobeyed company rules and his conduct merits discipline. The Employer was justified in considering the disciplinary record. The Board also ruled that the culminating incident does not have to be similar to prior incidents. Since the Grievor was given sufficient notice that further misconduct could result in discharge, the Board upheld the termination.

DISSENT: T. Ulrich, Nominee for the Union. Mr. Ulrich disagreed with the majority's application of the doctrine of culminating incident because the incident was provoked. As well, the incident which was unrelated to others on the Grievor's record was not directed against the Employer but against a persistent tormentor. Mr. Ulrich would have imposed a five-day suspension without pay.

AUTHORITIES: **Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 707** 7 (L.A.C.) (2d) at 199; and others.

FILE NO. AA87-11-001

EMPLOYER:	Canada Safeway Limited
UNION:	Manitoba Food and Commercial Workers, Local 832
ARBITRATOR:	G.C. MacLean, Q.C.
APPEARANCES:	R.J. Hansell, Q.C., for the Employer M. Minuk, et al, for the Union
ISSUES:	1. Standard of Proof: Criminal Misconduct 7:2500 2. Grounds for Discipline: Theft 7:3310 3. Grounds for Discipline: Obligation of Explanation 7:3312
DECISION RENDERED:	November 5, 1987
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor was employed as a variety clerk. She had set aside two boxes to take home, which was a common practice for employees. The head variety clerk examined the boxes and found they contained unpaid store merchandise. She told the store manager, who decided to leave the boxes in place as bait to catch a thief. When the box containing the merchandise was found in the Grievor's car, she was dismissed. The Grievor was tried on criminal charges, and was found not guilty

The Union filed a grievance alleging that the Grievor was unjustly dismissed. The Grievor claimed that a spare set of keys to her car was missing, and she denied placing the boxes in her car. She also denied putting anything in the boxes. The Employer alleged that because the Grievor had stolen merchandise she was properly dismissed.

AWARD: The grievance was denied. The Arbitrator concluded that the evidence against the Grievor outweighed that in her favour. The Arbitrator also ruled that the Employer met the onus to prove the dismissal was justified on the balance of probabilities.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, (2nd) pp. 347-349.

FILE NO. AA87-11-002

EMPLOYER: The Health Sciences Centre

UNION: The Manitoba Paramedical Association

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: W.S. Gardner, Jr., for the Employer
C. Lercher, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470
2. Grounds for Discipline: Innocent Absenteeism 7:3210
3. Entitlement to a Job: Proof of Recovery 8:3342
4. Grounds for Discipline: Onus 7:3250

DECISION RENDERED: November 10, 1987
(Interim Award - October 28, 1987)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In 1976, the Grievor was hired as a full-time Technician, but her status was changed to part time due to her history of excessive absenteeism. Four years later she was reinstated to full time when her attendance had improved. By the end of the next year, she was placed back on part time due to the continued problem of absenteeism. After a number of warnings, the Grievor was discharged due to her unacceptable attendance record.

The Union filed a grievance alleging that the Grievor was wrongly discharged. In its view, the Grievor had not received proper warnings and received a number of mixed messages from the Employer which did not clearly state that her employment was in jeopardy. The onus was on the Employer to prove excessive absenteeism and that the Grievor was unlikely to improve her record. The Union felt that the Employer had failed to do this.

The Employer was satisfied that the Grievor's absences were due to bona fide medical reasons. The Employer also acknowledged the Grievor's good work record. However, the problems relating to her health and physical ability to attend work presented a continuing problem to herself and to the Hospital. The Employer agreed that the burden was on itself to prove the likelihood that absenteeism was excessive. Since the Employer felt that this fact was proven, the onus shifted to the Grievor to prove the likelihood that her record would improve. The Employer foresaw no reasonable likelihood of the Grievor being able to maintain attendance at work. The Employer pointed out the number of times that the matter of the Grievor's absenteeism record had been discussed with the Grievor and other members of the Union. As a result of these meetings, the Employer suggested that the Grievor utilize the Employee Assistance Program. She refused to attend the program, refused to consult a physician, and did not disclose her pregnancy, which accounted for her most recent absences.

The Union was of the opinion that the Grievor's attendance had shown considerable improvement. Her allergies were under medical control and had lessened since the office was relocated to new quarters. Therefore, there was no conclusive medical evidence to support the Employer's view. As for not disclosing her pregnancy, the Grievor was in the early stages and was unsure of how it was proceeding.

AWARD: The grievance was allowed. The Arbitrator did find that the Grievor's absenteeism was excessive, but was satisfied that she was making an effort to improve her record. He ruled that the termination was not justified, although some disciplinary action was merited. Therefore, he ordered the Employer to reinstate the Grievor on a probationary basis as a part-time employee with no loss of seniority. However, because she did not disclose her pregnancy to the Employer and refused to attend the Employee Assistance Program, the Grievor would not be granted any back pay or other benefits from the time she was terminated until her reinstatement.

AUTHORITIES: Palmer, **Collective Agreement Arbitration in Canada**, (2nd ed.), pp. 419 to 426; and numerous others.

FILE NO. AA87-11-003

EMPLOYER:	INCO Ltd.
UNION:	United Steelworkers of America, Local 6166
ARBITRATOR:	S.G. Sigurdson, Q.C.
APPEARANCES:	J.M. Christiansen, for the Employer B. McGrath, for the Union
ISSUES:	1. Grounds for Discipline: Innocent Absenteeism 7:3210 2. Grounds for Discipline: Onus: 7:3250 3. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470
DECISION RENDERED:	November 24, 1987
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, an employee with seven years of service, had an eighteen-month history of limited work due to knee and back problems. His accident and sickness benefits were discontinued because medical evidence could not be found to attribute his back condition to his inability to work. The doctor suggested the problem resulted from a lack of initiative. Upon returning to work after a six-month absence, he was informed that he was discharged due to his poor attendance resulting from his medical condition.

The Union filed a grievance alleging that the Grievor was discharged without just cause for two reasons. First, the onus was on the Employer to establish that the Grievor would not be able to perform his employment obligations. The Employer failed to prove this because, according to the medical evidence and the Grievor himself, he was able to work. Second, the Grievor was not given any warning that his employment was in jeopardy. In fact, when the Grievor questioned the Employer about rumours he had heard that he may be fired, he was told that they were not true.

The Employer argued that the Grievor's medical and attendance record, and the prognosis for the future, proved the non-viability of the Grievor's continued employment. Therefore, the termination was justified.

AWARD: The grievance was allowed. The Arbitrator ruled that the absenteeism was excessive, but was satisfied from the medical evidence that the Employer had not established the likelihood that the Grievor was not physically capable of working. The evidence pointed to a lack of initiative which may have been sparked if the Employer had warned the Grievor of the possibility of termination. Therefore, the Arbitrator ordered the reinstatement of the Grievor on a probationary basis for one year. Also, conditions were outlines which, if breached, could result in just cause for discharge.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, 2nd ed., at pp. 371--373; and **Re Atomic Energy and Office & Professional Employees**, 5 L.A.C. (3d) at 249.

FILE NO. AA87-11-004

EMPLOYER: Manitoba Telephone System

UNION: Communications Workers of America

BOARD: D.E. Bowman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
J.K. Collins, Nominee for the Union

APPEARANCES: E.W. Olson, Q.C., for the Employer
G. Mendelson, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: The Statutory Requirement 2:1100
2. Jurisdiction of the Arbitrator: The Collective Agreement 2:1200
3. Limits to the Arbitration of Grievances: Arbitrability: Time Limits 2:3128
4. Limits to the Arbitration of Grievances: Arbitrability: Delays 2:3200

DECISION RENDERED: November 24, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The purpose of this hearing was to determine preliminary objections to jurisdiction and arbitrability of the grievance filed on behalf of the Union and a number of grievors.

Since the early 1970's, the Employer adopted a policy whereby the eligibility and amount of a northern allowance paid to its employees in northern Manitoba was based upon the number of dependents claimed by an employee for income tax purposes. Because the spouses of many of the employees claimed the deduction, these employees who could not claim their dependents were only granted northern allowances for a single person. The amount received was less than the amount granted to an employee with dependents. Around 1978, this position was amended under a new agreement, but the policy and practice continued. In the fall of 1983, the Union and Employer became aware that the policy was in violation of the provisions under the collective agreement. The Union filed grievances in the name of seven grievors and the Union sought back pay without a limitation to the time involved.

As employees were reimbursed for any unpaid northern allowance back to October 1982, the Employer stated that no claims could be grieved under the terms of the existing collective agreement. The Employer's position was that claims prior to October 1982 were not part of the collective agreement in effect at the time of the grievance. Therefore, the Board lacked jurisdiction to determine any of the alleged grievances. As well, the Employer maintained that the grievances were not filed in the time frames permitted in the collective agreements in force at the times in question.

The Union argued that because neither the Employer nor the Union had been aware of the fact that the policy being followed was in violation of the collective agreement there could be no time limit, at least after 1978 when the amendment was made. With reference to the Board's jurisdiction, the Union held that an appropriate grievance could not be without a remedy and a board of arbitration should not be barred from considering a grievance under a prior agreement.

AWARD: The Board found that it did have jurisdiction and that the grievance ws arbitrable. It was satisfied that it had jurisdiction to deal with the question raised because it was appointed under the existing collective agreement and could be deemed to be appointed under each of the respective collective agreements applying at the given times. Subsection 69(5) of The

Labour Relations Act provides that the arbitration provisions in a collective agreement survive the agreement itself. The Board did not find that time limits were breached, but if they were, the Board, under subsection 109(2)(e) of **The Labour Relations Act**, had the power to relieve against time and procedural limits. Therefore, the grievances were found to be arbitrable.

DISSENT: G.D. Parkinson, Nominee for the Employer. Reasons were not submitted.

AUTHORITIES: **Re Red River Division Association No. 17, Manitoba Teachers' Society and Red River School Division No. 17**, 25 D.L.R. (3d) 106; and others.

FILE NO. AA87-11-005

EMPLOYER:	The Province of Manitoba
UNION:	The Manitoba Government Employees' Association
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	R.D. Cram, for the Employer G. Rodgers, for the Union
ISSUES:	1. Organization and Direction of the Work Place: Temporary, Casual, and Part-time Employees 5:1124 2. Entitlement to a Job 8:3340 3. Seniority: Lay-off 6:2200
DECISION RENDERED:	November 26, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor was hired as an instructor in the Resources Management Technical Program on a one-year term position, which was subject to review and renewal. During the second year of his term, the Grievor went on sick leave. While on sick leave, the Employer hired someone to assume the duties of the Grievor. Upon his return to work, the Grievor's duties were divided between the Learning Assistance Centre and the Resource Management Technology Program. Three years after the term began, the Grievor was informed that his term would be extended for a further three months, but would not be renewed after the expiration date.

The Union filed a grievance alleging that the Grievor was improperly terminated because of the no lay-off agreement between the Union and the Employer. The termination was also unjust because the person hired to replace the Grievor on a temporary basis had superseded him permanently. The Union further argued that the Grievor would still be employed if he had not gone on sick leave. Finally, according to article 5:04 of the collective agreement, the Grievor's status should have been changed to regular civil service status. Article 5:04 states that a term employee becomes a regular civil servant when he has continuously served in and performed the same job function for twenty-four months and there is a need for the function to continue.

The Employer argued that the Grievor was hired for a specified time, which had expired. The Grievor had never been given a commitment that his term would be extended beyond the term specified. The Employer stated that article 5:04 could not be applied to this case because the article was not specified in the grievance, as was required in article 43:06 of the collective agreement.

AWARD: The grievance was denied. The Arbitrator found that the award could not be based on the no lay-off clause because it was not part of the collective agreement. Therefore, ruling on the no lay-off clause was not within his jurisdiction, as his authority is based solely on the items in the collective agreement. Although, as stated by the Employer, article 5:04 was not specified in the grievance, article 43:06 and **The Labour Relations Act** state that a grievance is not invalid because of failure to quote an article. Nevertheless, the Arbitrator ruled that all the conditions under article 5:04 were not met. No evidence was presented as to the need for the instructor function in the future. The Arbitrator also found a lack of evidence on the current status of the employee who was hired to replace the Grievor. Therefore, the Arbitrator ruled that the Grievor was a term employee whose term had expired.

AUTHORITIES: Brown & Beatty, **Canadian Labour Arbitration**, 2nd ed., at p. 609; **Re United Steelworkers, Local 6571 and Lake Ontario Steel Co.**, 18 L.A.C. 424; and **Re The Province of Manitoba vs. The Manitoba Government Employees' Association**, Manitoba Labour Board, Compendium of Grievance Arbitration Decisions 1987.

FILE NO. AA87-12-001

EMPLOYER:	Winpak Ltd.
UNION:	Canadian Paperworkers Union
BOARD:	G.C. MacLean, Q.C., Chairperson R.A. Simpson, Nominee for the Employer M. MacKay, Nominee for the Union
APPEARANCES:	H. Piercy, for the Employer S. Green, Q.C./R. Tonn, for the Union
ISSUE:	The Arbitration Process: Adjournments 3:2300
DECISION RENDERED:	December 16, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Board convened on October 5, 1987, to hear evidence relating to a grievance. (The specifics of the grievance are not stated in the award.) Due to a misunderstanding, the Grievor was led to believe that the hearing was scheduled for November 5, 1987. The Grievor was unable to attend on the original hearing date because he was out of the country. The Board granted an adjournment to allow the Grievor the opportunity to return. No firm arrangements were made to reconvene due to the absence of the Grievor, who gave no indication that he would be returning for the rescheduled hearing.

AWARD: The grievance was dismissed. The Board considered the matter concluded because the Grievor had no intention of appearing on November 5, 1987.

AUTHORITIES: No authorities were cited in the award.

FILE NO. AA87-12-002

EMPLOYER:	The Liquor Control Commission of Manitoba
UNION:	The Manitoba Government Employees' Association
BOARD:	J.M. Chapman, Q.C., Chairperson G.D. Parkinson, Nominee for the Employer D. Atkinson, Nominee for the Union
APPEARANCES:	E.W. Olson, Q.C./V. Rachlis, for the Employer G. Rogers, for the Union
ISSUES:	1. Discipline and Discharge Procedures: Burden of Proof 7:2300 2. Grounds for Discipline: Theft 7:3310 3. Disciplinary Penalties: The Reasonableness of the Penalty 7:4300
DECISION RENDERED:	December 15, 1987
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, the Assistant Manager at a Liquor Commission store, was suspected by the Employer of stealing liquor. One evening, while under surveillance, the Grievor was observed taking parcels from the store to his car. When he was approached by the security guard, he drove off. Approximately half an hour later, the Grievor was stopped by the police. The Grievor denied that he had removed any liquor from the store. Upon searching the car, the police could not find any stolen merchadise. As a result of an investigation of the incident, the Grievor was discharged.

The Union filed a grievance alleging that the Grievor was unjustly terminated, because the accusations made by the Employer were false. The Employer could not prove that the Grievor had stolen liquor, because it was not established what was in the bags the Grievor had been seen taking to his car. The Grievor claimed the bags contained personal belongings.

The Employer contended that the evidence, the testimony of the witnesses, and the Grievor's actions clearly substantiate its position.

AWARD: The grievance was disallowed. Despite the Grievor's clear disciplinary record, the Board was satisfied that the evidence proved the Grievor had committed an offence. Also, the Board was not satisfied that the offence was an isolated incident or was not premeditated. Because the Grievor was employed in a position of trust and had committed a serious offence, the Board found that the discharge was justified. However, the Board made a non-binding recommendation to the Employer to ascertain if other work would be available for the Grievor, considering his lengthy record of employment.

DISSENT: D. Atkinson, Nominee for the Union. Reasons were not included.

AUTHORITIES: **Re Toronto Hydro Electric System and C.U.P.E., Local 1**, 19 L.A.C. (2d) at 252, pp. 258-260; **Re B.C. Telephone Company and Telecommunication Workers, Local 1**, 19 L.A.C. (2d) at 225, pp. 229-230; and others.

FILE NO. AA87-12-003

EMPLOYER: Burns Meats Ltd.

UNION: The United Food and Commercial Workers International Union, Local 111

ARTIBRATOR: G. Reid

APPEARANCES: C.G. Labman, for the Employer
R. Tonn, for the Union

ISSUES:
1. Grounds for Discipline: Leave Work Without Permission 7:3130
2. Grounds for Discipline: Insubordination Refusal to Follow Instructions 7:3610
3. Disciplinary Penalties: The Reasonableness of the Penalty 7:4300
4. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: December 27, 1987

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was employed for thirteen years as a "boner", and was responsible for other duties as assigned. On the day in question, the Grievor was assigned to replace another worker in the Hotels, Restaurant and Institutions Room. The Grievor was told by the foreman that he would be needed until the end of the shift. However, the Grievor left work fifteen minutes early without permission. The Grievor claimed he had left at the same time as the other boners. The Employer did not accept this as an adequate explanation, because the Grievor had not been working as a "boner" at the time of the incident. As a result, the Grievor was dismissed.

The Union filed a grievance stating that the Grievor was unjustly terminated. The Union agreed that the Grievor had knowingly violated a Company policy, but disagreed with the harshness of the penalty.

The Employer felt the termination was justified because it had clearly stated and posted the policy of leaving without permission. As well, the Grievor was aware of the sanctions concerning violation of the policy.

AWARD: The grievance was allowed in part. Although the Grievor had only left work fifteen minutes early, this was clearly a case of insubordination. However, even though the Employer announced that an employee would be dismissed for leaving work early without permission does not mean it necessarily has the authority to do so. Because the Grievor was a long-term employee who was the recipient of relatively little discipline and none recent to this incident, the Board rescinded the dismissal. Instead, due to the insubordination of the Grievor, the Board imposed a suspension of thirty working days.

AUTHORITIES: Numerous cases were cited in the award.

FILE NO. AA87-12-004

EMPLOYER: The Workers Compensation Board

UNION: The Canadian Union of Public Employees, Local 1063

BOARD: J.M. Chapman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
C. Trigwell, Nominee for the Union

APPEARANCES: W.S. Gange, for the Employer
R. Tonn, for the Union

ISSUES:
1. Seniority: Proof of Ability: Senior Employee If Relatively Equal 6:3220
2. Seniority: Ability and Qualifications Criteria 6:3300
3. Remedial Authority of the Arbitrator: Promotions 6:4100

DECISION RENDERED: December 29, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor had been a Collection Officer, when he accepted a lateral transfer in 1983 to become an Assessment Auditor. In 1987 the Grievor applied for, but was not offered, the position of Senior Collection Officer. The other applicant, who was the successful candiate, had been a Collection Officer for approximately three years, and had less seniority than the Grievor. The Union filed a grievance alleging that the Employer had violated article 9:01 of the collective agreement which required the Employer to base a promotion on seniority if the candidates were relatively equal.

The Employer felt it had been completely fair, open, and unbiased in its actions. It had objectively weighed the qualifications of the two applicants based upon a set of criteria. Although either applicant could perform the job function, the Employer stated that the successful candidate had more supervisory and training experience, and, therefore, was more qualified than the Grievor. The Employer stressed the difficulty which would have occurred if the Grievor had been awarded the position. Because the position was approved on the basis of no staff increases, the Employer would have had to release the Collection Officer who had less seniority than either the Grievor or the successful candidate.

The Union questioned the fairness of the evaluation process. Not only did the Grievor have more education than the other applicant, but he had a broader knowledge of the organization. The Employer had placed too much emphasis on the supervisory duties of the new position which the Union felt were minimal. The Union accused the Employer of selecting the other applicant "to avoid trouble and dislocation", which was not a relevant selection criteria. In its view, the Grievor had demonstrated that he was a superior employee, and based on his seniority, should have been awarded the position.

AWARD: The grievance was allowed. The Board found that both applicants were qualified to fulfill the position. As well, the Board could not find evidence that the Employer had acted in a discriminatory or biased manner. However, the Board did have difficulty in accepting the reasonableness of the weighting of some of the questions asked during the interviews. The Board found that the Grievor had met the onus to demonstrate that his qualifications were relatively equal to the successful candidate's. Therefore, in view of this and his seniority, he should have been awarded the position.

DISSENT: G.D. Parkinson, Nominee for the Employer. Mr. Parkinson felt the award was wrongly based on the conclusion that the position required little supervisory and training skills. However, the level of supervision and training had increased since the reclassificaiton of the position. The Union must accept the newly required supervisory qualification because it had acknowledged that the position warranted a higher rate of pay. Since the Grievor admitted that he did not have the equivalent "demonstrated" ability in supervision and training as the successful candiate, the Board should have dismissed the grievance.

AUTHORITIES: **Re Brant County Board of Education and Canadian Union of Public Employees, Local 282**, 8 L.A.C. (2d) at 153, pp. 155-156; **Re British Leaf Tobacco Co. of Canada Ltd. and Canadian Union of Operating Engineers & General Workers**, 3 L.A.C. (3d) at 235, p. 239; and others.

FILE NO. AA87-12-005

EMPLOYER: The City of Winnipeg

UNION: The Canadian Union of Public Employees, Local 500

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
M. Myers, Q.C./D. Maccri, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Changes in Job Function 5:2410
2. Compensation: Withholding Wages 8:1420
3. Onus or Burden of Proof: Classification 3:2414

DECISION RENDERED: December 29, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as a Senior Clerk in the Hydro Department. He was also assigned to perform the duties of the Supervisor during the absence of the Supervisor. Although the Grievor was performing the Supervisor's duties, his pay was only adjusted to the rate of a Principal Clerk. The new rate became effective after the third day that the Grievor was in the position. The Union filed a grievance alleging that the Employer was violating article 13 of the collective agreement. The article stated that an employee who temporarily assumes the majority of the duties and responsibilities of a higher classification would receive the minimum rate of the higher classification immediately.

The Employer maintained that the classification and payment of the Grievor as a Principal Clerk was correct for a number of reasons. First, the Senior Clerk did not assume policy and personnel duties of the Supervisor. Second, the Grievor's duties did not change significantly when he assumed the extra supervisory duties.

The Union argued that the Grievor was performing 90% of the Supervisor's duties. The performance of policy and personnel matters was irrelevant since the Supervisor spent a minimal amount of time on these matters. In addition, the Grievor only had to establish that he was doing substantially the work of the Supervisor and not the identical duties. As well, the Employer was not justified in paying the Grievor on the basis of a position that did not exist or unilaterally deciding that the pay would be withheld for three days.

AWARD: The grievance was allowed. The Arbitrator was satisfied that the Grievor was performing the majority of the Supervisor's duties. The Arbitrator also found that the Employer violated the collective agreement by withholding the higher level of pay for three days. Therefore, the Arbitrator ordered that the Grievor should be paid at the supervisory classification, and not as a Principal Clerk, immediately upon the assumption of those duties. Due to the expiration of time limits, retroactive pay prior to the date of the grievance was not awarded.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA87-12-006

EMPLOYER: Bechtel/Kumagai

UNION: General Teamsters, Local 979

ARBITRATOR: P.W. Schulman, Q.C.

APPEARANCES: G.D. Parkinson, for the Employer
A.R. McGregor, Q.C./D.L. Lewis, for the Union

ISSUES:
1. Grounds for Discipline: Sabotage 7:3410
2. Disciplinary Penalties: Use of the Prior Record 7:4314
3. Disciplinary Penalties: The Reasonableness of the Penalty 7:4300

DECISION RENDERED: December 30, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as a Pitman Operator at a Manitoba Hydro construction site. The Grievor was teamed up with a Journeyman Carpenter who hooked up the loads of material to be moved by the Grievor's Pitman. While lifting the second load, the boom buckled causing $11,000 damage. As a result of this accident and others on the Grievor's record, the Employer lost confidence in the Grievor and terminated his employment.

The Union acknowledged that the Grievor had made an error of judgment, and, therefore, the termination was excessive. The Union argued that the Employer could not have lost confidence in the Grievor's ability because the Grievor was rehired one month later as an Agitor Operator. As well, the Grievor should not be expected to accept full responsibility for the accident because the Carpenter and the Employer must also share some of the blame. Finally, the Union alleged that the Employer discharged the Grievor without obtaining information as to how the accident happened.

AWARD: The grievance was disallowed. The Arbitrator found that the Grievor had acted recklessly and neither the Employer nor the Carpenter had contributed to the accident. Based upon the Grievor's conduct in this instance and the Grievor's past accident record, the Employer had lost confidence in the Grievor's ability. Rehiring the Grievor affirmed the reasonableness of the Employer's approach to its employees. Therefore, the Arbitrator found that the termination was justified.

AUTHORITIES: Numerous authorities were cited in the award.

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